Supreme Court, U.S.
FILED
NOV 9 - 1995
OFFICE OF THE CLERK

No. 95-744

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

JAMES GILBERT,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

and

INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS, AFL-CIO

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR A WRIT OF CERTIORARI

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November, 1995

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QUESTIONS PRESENTED

I. Does a union restrain or coerce employees in violation of section 8(b)(1)(A) of the National Labor Relations Act ("NLRA" or "Act"), 29 U.S.C § 158(b)(1)(A) (1988), when it enforces a compulsory unionism provision against employees whose membership rights are substantially impaired or denied:

   A. as discipline for their exercise of rights guaranteed by section 7 of the Act, 29 U.S.C. § 157 (1988), regardless of whether the discipline itself was lawful; and/or,

   B. for any reason other than their failure to tender the dues and fees uniformly required as a condition of membership, even where the reason is unrelated to the exercise of rights guaranteed under section 7 of the Act?

II. Did the National Labor Relations Board fail to exercise its discretion rationally and consistently with prior law, because it did not explain its departure from its many prior decisions holding that a union violates section 8(b)(1)(A) if it enforces a compulsory unionism provision against employees whose membership rights are substantially impaired or denied as discipline for their exercise of rights guaranteed by section 7, regardless of whether the discipline itself was lawful?

III. Does the right of employees to self-organization and to refrain from forming, joining, or assisting labor organizations, and from bargaining collectively and engaging in concerted activities, guaranteed in section 7 of the NLRA, protect employees' efforts to convince the membership of their local to remove positions from a bargaining unit represented by a union that they oppose?

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NATIONAL LABOR RELATIONS BOARD,

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INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS, AFL-CIO,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner James Gilbert respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered on June 16, 1995.

OPINIONS BELOW

The opinion of the court of appeals is reported at 56 F.3d 1438 (Appendix ("App.") A, *infra*, 1a). The opinions of the

National Labor Relations Board ("NLRB" or "Board") and its Administrative Law Judge ("ALJ") are reported, respectively, at 312 N.L.R.B. 218 and 312 N.L.R.B. 220 (App. B, *infra*, 19a, 27a).

JURISDICTION

The court of appeals entered its judgment on June 16, 1995. It denied a timely petition for rehearing and suggestion for rehearing *in banc* on August 16, 1995 (App. C, *infra*, 56a-57a). This Court's jurisdiction is invoked under 28 U.S.C.A. § 1254(1) (West 1993) and 29 U.S.C. § 160(e)-(f) (1988).

STATUTORY PROVISIONS INVOLVED

This case involves sections 7, 8(a)(3), and 8(b)(1)(A) of the National Labor Relations Act ("NLRA" or "Act"), 29 U.S.C. §§ 157, 158(a)(3), and 158(b)(1)(A) (1988). Their pertinent text is set out in Appendix D, *infra*, 58a.

STATEMENT OF THE CASE

This is an unfair labor practice case under the NLRA. Petitioner James Gilbert ("Gilbert") is an employee of the Kaiser Cement Corporation ("Kaiser Cement"). Kaiser Cement is "engaged in commerce and in a business affecting commerce within the meaning of Section 2(2), (6) and (7) of the Act," 29 U.S.C. § 152(2), (6)-(7) (1988). App. B at 29a. At the relevant time, Gilbert was a member of the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO ("Boilermakers"). The Boilermakers is "a labor organization within the meaning of Section 2(5) of the Act," 29 U.S.C. § 152(5) (1988). App. B at 29a.

In December 1988, the Boilermakers disciplined Gilbert and three other employees of Kaiser Cement for presenting or supporting a resolution at a membership meeting, or circulating a petition, in an effort to convince the members of their local to agree to removal of certain positions from their bargaining unit. App. A at 6a. The discipline consisted of a prohibition on holding union office and attending any union meetings or functions, except a meeting at which a vote would occur on a contract directly affecting them, for periods of two to five years. App. B at 39a-40a.

After they were disciplined, the four employees jointly sent the Boilermakers' International President letters asking whether they must pay dues while their membership rights were suspended, and what penalties would be imposed if they stopped paying dues. The International President responded in letters dated May 22 and July 20, 1989. He said that the employees must continue paying dues to remain members in good standing, and that the Boilermakers would request their discharge under the compulsory unionism agreement with Kaiser Cement if they ceased paying dues. *Id.* at 40a-44a.

On October 6, 1989, Gilbert filed an unfair labor practice charge with the NLRB. His charge asserted that the Boilermakers violated section 8(b)(1)(A) of the Act by threatening to have him and the other disciplined employees discharged "if they stopped paying union dues, 'despite the Union's failure to offer said employees membership under the same terms as other employees.'" *Id.* at 47a. The NLRB's General Counsel issued a complaint alleging that the Boilermakers violated section 8(b)(1)(A) by threatening to cause the employees' discharge under the compulsory unionism agreement while the union had "substantially impaired the[ir] membership rights" as discipline for engaging in "protected concerted activities within the meaning of Section 7 of the Act." App. E, *infra*, 60a, 62a-63a.

The case was tried before an Administrative Law Judge who issued a decision recommending that the case be dismissed "in its

entirety." App. B at 55a. Although the General Counsel did not allege that the discipline itself was unlawful, *see* App. E at 62a-63a, the ALJ nonetheless first addressed that issue. He ruled that the discipline did not violate section 8(b)(1)(A), because the union "was vindicating a legitimate union interest—to prevent erosion of its status as collective-bargaining representative." App. B at 50a-53a.

Without explaining why, the ALJ assumed that this also meant that the employees "were not disciplined for the exercise of any rights protected by Section 7." He then held that, therefore, "the invoking of a lawful union security clause is not unlawful." *Id.* at 53a. The ALJ also rejected the General Counsel's contention "that even if the activities of the alleged discriminatee[s] for which they were disciplined were not protected, their membership rights have been so substantially reduced that enforcement of the union-security clause against them becomes unlawful." *Id.* at 54a.

The General Counsel filed exceptions to the ALJ's decision. They presented to the Board "the question of whether the Respondent Union has violated Section 8(b)(1)(A) of the Act by threatening four dissident employee-members with enforcement of the union-security clause if these employees discontinued paying membership dues after the Respondent had imposed discipline on them that substantially impaired their membership rights." However, the Board adopted the ALJ's recommended order and dismissed the case. *Id.* at 19a.

Like the ALJ, the Board first held that the Boilermakers could lawfully discipline the four employees for "conduct designed to oust or undermine the Union in its role as representative of the employees," *id.* at 24a-26a, although the General Counsel did not contend that the discipline itself was unlawful. The Board then ruled that, "[b]ecause the Respondent's discipline of these members did not violate the Act," it could lawfully enforce the compulsory unionism clause against the employees

even though their membership rights had been "impaired." *Id.* at 26a.

Unlike the ALJ, the Board did not determine whether section 7 protected the employees' activity. The Board merely noted that, "if it does not itself affect the employment relationship, the union may be able to impose the discipline even if it is aimed at a Section 7 right." *Id.* at 24a.

The Board also did not explain how it could distinguish this case from a long line of prior cases that began with *Steelworkers Local 4186 (McGraw Edison)*, 181 N.L.R.B. 992 (1970). In those cases, the Board held that a union violates section 8(b)(1)(A) by enforcing a compulsory unionism provision "where membership is denied or impaired because of employees' exercise of rights guaranteed them under Section 7 of the Act," even if the discipline itself is lawful. *Communications Workers Local 1104*, 211 N.L.R.B. 114, 116-17 (1974), *enforced*, 520 F.2d 411 (2d Cir. 1975), *cert. denied*, 423 U.S. 1051 (1976).[1]

Gilbert then petitioned for review in the United States Court of Appeals for the District of Columbia Circuit. Jurisdiction lay in that court under section 10(f) of the NLRA, 29 U.S.C. § 160(f) (1988). The Boilermakers intervened.

On June 16, 1995, a three-judge panel of the court of appeals denied Gilbert's petition for review. The panel held that enforcement of the compulsory unionism clause in the circumstances of this case was permissible under section 8(a)(3) and, thus, did not violate section 8(b)(1)(A), because the employees were disciplined "for violating valid internal Union rules that applied uniformly to every other member," and because the employees' "membership was never 'denied' or 'terminated,'" but only impaired. App. A at 10a-11a.

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[1] The General Counsel relied on the *McGraw Edison* doctrine. *See* App. B at 53a.

The court of appeals' panel also concluded that "the Board has not departed from its precedent." *Id.* at 14a. The panel believed that the Board had applied the *McGraw Edison* rule only in cases in which "(1) the discipline imposed on the employee . . . result[ed] in the denial, termination, or full suspension of the employee's membership, and (2) the discipline itself . . . impair[ed] the exercise of a 'fundamental' section 7 right . . . ," *id.* at 17a. The panel distinguished this case, because the employees' membership was merely impaired, and because, the panel held, "the Board properly concluded that [their] conduct did not involve one of th[e] so-called 'fundamental' section 7 rights." *Id.* at 14a-16a. The panel did not explain why the employees' conduct was not protected under section 7.

Meanwhile, however, in another decision that Gilbert's counsel did not see until after the panel's decision in this case, the Board ***itself*** contradicted the panel and explicitly held that its decision here "overruled sub silentio" the *McGraw Edison* line of cases. *Transportation Workers Local 525 (Johnson Controls World Servs.)*, 317 N.L.R.B. No. 62, slip op. at 1 n.2, 4-6, 149 L.R.R.M. (BNA) 1222 (May 12, 1995). App. F, *infra*, 64a, 64a n.2, 73a-82a. Gilbert, therefore, filed a timely petition for rehearing and suggestion of rehearing *in banc*, which the court of appeals denied on August 16, 1995. App. C at 58a-59a.

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals Decided an Important Question Left Open by This Court in *NLRB v. General Motors*, But in a Way Incompatible with the Act's Terms and The NLRB's Consistent Prior Interpretation of the Act

A. Whether a Union Can Compel Workers to Pay Dues As a Condition of Employment While It Denies or Substantially Impairs Membership for a Reason Other Than Nonpayment Is an Important Question Of Employee Rights Left Open in *General Motors*

A right explicitly guaranteed in section 7 of the NLRA is the "right to refrain from" union membership "except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section [8(a)(3)]." 29 U.S.C. § 157. Section 8(a)(3) in turn prohibits the enforcement of such agreements where membership is "(A) . . . not available to the employee on the same terms and conditions generally applicable to other members, or (B) . . . denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership." 29 U.S.C. § 158(a)(3), 2d proviso (1988).

Thus, it is clear from the terms of the Act that a union restrains the exercise of the right to refrain from union membership—and thus violates section 8(b)(1)(A)—by enforcing a compulsory unionism agreement against employees in the circumstances prohibited by section 8(a)(3).

In *NLRB v. General Motors Corp.*, 373 U.S. 734, 742 (1963), this Court held that, under "the second proviso to § 8(a)(3), the burdens of membership upon which employment may be conditioned [in a union shop] are expressly limited to the

payment of initiation fees and monthly dues."[2] Consequently, sections 8(a)(3) and 7 authorize an "agency shop arrangement" which "places the option of membership in the employee while still requiring the same monetary support as does the union shop." *Id.* at 744-45.

However, *General Motors*, 373 U.S. at 745 n.12, expressly left open whether an employee denied full union membership for some reason other than nonpayment of dues can be discharged if he then does not pay dues: "the significance of desired, but unavailable, union membership, or the benefits of membership, in terms of permissible § 8(a)(3) security contracts, we leave for another case." The Court has not yet addressed this question.

This case presents the question left open in *General Motors*. As the court of appeals pointed out, Gilbert and the other disciplined employees "chose not to resign" their membership. App. A at 8a, 11a. Obviously, then, they wanted the benefits of membership, at least while their positions remained in the bargaining unit represented by the Boilermakers. Yet, as discipline for attempting to convince their local's members to agree to remove certain positions from the unit, the Boilermakers denied these employees the most significant benefits of membership, *i.e.*, the rights to hold union office and attend and participate in union meetings and functions. The Boilermakers also threatened these employees with discharge if they stopped paying union dues while it thus substantially impaired their membership rights.

Whether a union can enforce a compulsory unionism provision in these circumstances is an important issue which this Court should settle. The issue is important, because a requirement that employees financially support a union impairs a fundamental congressional policy imbedded in section 1 of the Act, 29 U.S.C.

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[2] This holding was reaffirmed in *Pattern Makers v. NLRB*, 473 U.S. 95, 106 n.16 (1985), and *Communications Workers v. Beck*, 487 U.S. 735, 749 (1988).

§ 151 (1988), and section 1(b) of the Labor Management Relations (Taft-Hartley) Act, 29 U.S.C. § 141(b) (1988).[3] That policy is the protection of employees' "full freedom of association," 29 U.S.C. § 151, and "the rights of individual employees in their relations with labor organizations," 29 U.S.C. § 141(b). One particular aspect of that explicit general policy of the Act is a "congressional policy of voluntary unionism" that is "implicit in § 8(a)(3)." *Pattern Makers v. NLRB*, 473 U.S. 95, 104-05, 114 (1985).

Indeed, protection of employee freedom of choice is ***the*** overriding purpose of the Act. In *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 280 (1956) (quoting 29 U.S.C. § 141(b)), the Court said that the declared policies of the Act "depend for their foundation upon assurance of 'full freedom of association.' ***Only after that is assured*** can the parties turn to effective negotiation as a means of maintaining 'the normal flow of commerce and . . . the full production of articles and commodities. . . .'"

B. The Decisions Below Overrule, Without Explanation By the NLRB, the Board's Longstanding, Consistent Prior Construction of the Act as to the Important Question Left Open in *General Motors*

Another reason for this Court to settle the issue left open in *General Motors* is the fact that the Board's decision here overruled, without explanation, its well-established prior construction of the Act as to a question that arises repeatedly. The relevant prior decisions are those in "a line of six Board decisions beginning with *McGraw Edison*, and culminating with *Machinists District 94 (McDonnell Douglas)*, 283 N.L.R.B. 881 (1987)." App. A at 13a (citation omitted). The other cases in this series are

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[3] Section 1(b) of the Taft-Hartley Act is significant here, because the "right to refrain" from assisting unions was added to § 7 of the NLRA, and § 8(b)(1)(A) was enacted, in Taft-Hartley. Pub. L. No. 80-101, ch. 120, sec. 101, 61 Stat. 136, 140-41 (1947).

Communications Workers Local 9509 (Pacific Tel. & Tel. Co.), 193 N.L.R.B. 83 (1971); *Communications Workers Local 1104*, 211 N.L.R.B. 114 (1974), *enforced*, 520 F.2d 411 (2d Cir. 1975), *cert. denied*, 423 U.S. 1051 (1976); *Telephone Traffic Union*, 241 N.L.R.B. 826 (1979); and *Inland Boatmen's Union (Dillingham Tug & Barge Co.)*, 276 N.L.R.B. 1261 (1985), *further proceedings sub nom. Dillingham Tug & Barge Corp.*, 278 N.L.R.B. 83 (1986).

As summarized in *Communications Workers Local 1104*, 211 N.L.R.B. at 116, the *McGraw Edison* rule was that a union violates § 8(b)(1)(A) "where membership is denied or impaired because of employees' exercise of rights guaranteed them under Section 7 of the Act," even if the denial or impairment of membership itself is lawful.

The court of appeals' panel, however, concluded that in this case the Board did not depart from the *McGraw Edison* line of cases, because the panel saw those cases, and the Board's decision here, as following a different rule:

> For a union [un]lawfully to demand, as a condition of continued employment, the continued payment of dues from a member who has been disciplined, two conditions must be met: (1) the discipline imposed on the employee must . . . result in the denial, termination, or full suspension of the employee's membership, and (2) the discipline itself must . . . impair the exercise of a 'fundamental' section 7 right (*e.g.*, the right of seeking access to the Board's processes).

App. A at 17a.

However, the Board's recent decision in *Transportation Workers Local 525*, App. F, *infra*, establishes that the rule of *McGraw Edison* was broader than thus erroneously interpreted by the court of appeals' panel. *Transportation Workers Local 525* also shows that here the Board overruled that rule *sub*

silentio even as to the limited circumstances in which the panel would apply it.

The panel held that the *McGraw Edison* rule does not apply where membership is only substantially impaired, as it was here, rather than wholly denied. App. A at 15a-16a. The panel thus ignored the fact that membership was only substantially impaired, not denied entirely, in ***both*** *McGraw Edison* itself, 181 N.L.R.B. at 992, and *Machinists District 94*, 283 N.L.R.B. at 892-93.[4] The panel's holding also is contrary to the Board's post-*Gilbert* formulation of the *McGraw Edison* rule in *Transportation Workers Local 525*, App. F at 77a (emphasis added): "The Board in the [*McGraw Edison* line of] cases . . . made it clear a union may not invoke a union-security clause of a collective-bargaining agreement against an employee whose full union membership has been ***significantly impaired*** due to the exercise of Section 7 rights."

The panel concluded that the Board's decision in this case was not an unexplained departure from the *McGraw Edison* line of cases, because it thought the Board was following the rule that the panel deduced from *McGraw Edison* and its progeny. *See* App. A at 12a-18a. To the contrary, however, in *Transportation Workers Local 525* the Board itself concluded that its decision in this case overruled *sub silentio* the *McGraw Edison* rule entirely. *Transportation Workers Local 525* also found no violation of

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[4] The panel viewed *Machinists District 94* as not "an 'impairment' case," but "really a case where the union improperly attempted to discipline employees who were no longer members." App. A at 16a-17a. That ignored cases holding that a union does ***not*** violate the Act if it imposes internal union discipline, such as expulsion or suspension, on employees who have resigned. *E.g., Slattery v. NLRB*, 961 F.2d 681, 685 (7th Cir. 1992); *Food & Commercial Workers Local 81*, 284 N.L.R.B. 1084, 1086 (1987). The panel's view also overlooks the fact that the General Counsel conceded, and the Board acknowledged, that the impairment of membership rights ***itself*** was ***lawful*** in *Machinists District 94*, 283 N.L.R.B. at 892 & n.44.

section 8(b)(1)(A) in the precise circumstances of the rule as defined by the panel.

In *Transportation Workers Local 525*, App. F at 77a, the discipline was expulsion from membership for circulating a petition seeking to have a rival union designated as the exclusive bargaining agent. The union conceded that section 7 protected the employee's conduct. It argued that, because the employees' conduct in *Gilbert* also "clearly was protected," the Board's decision here "overruled *McGraw Edison* sub silentio." *Id.* at 72a. The Administrative Law Judge recognized that section 7 protected the employee's conduct in *Transportation Workers Local 525*, App. F at 77a, concluding that "[l]ooking ***only*** at [the *McGraw Edison* line of] cases I am persuaded counsel for the General Counsel established a violation of Section 8(b)(1)(A) of the Act." However, the ALJ held that the union did not violate section 8(b)(1)(A), because he was "persuaded . . . that the Board overruled sub silentio all prior contrary cases when it decided" this case. *Id.* at 82a. In adopting the ALJ's conclusions, the Board "specifically affirm[ed] his interpretation" of its decision in this case. *Id.* at 64a n.2.

Thus, it is clear that, contrary to the panel's opinion, the Board here overruled the *McGraw Edison* line of precedent without acknowledging that it was doing so or giving its reasons for reversing course. That violates the principle that "an agency changing its course . . . is obligated to supply a reasoned analysis for the change," *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Ins. Co.*, 463 U.S. 29, 42 (1983). At a minimum then, the court of appeals should have vacated the Board's decision and remanded the case to the Board for reconsideration and an explanation of its reasons for overruling the *McGraw Edison* rule. *See NLRB v. Metropolitan Life Ins. Co.*, 380 U.S. 438, 442-44 (1965).

C. The Board's Prior Rule, But Not the Court of Appeals' Decision, Is Consistent with the Act's Terms

The *McGraw Edison* rule is consistent with the terms of section 8(a)(3) and the policy of voluntary unionism underlying the Act as a whole. The court of appeals' decision is not.

The first circumstance defined in section 8(a)(3)'s second proviso, under which an employee may not lawfully be discharged for failure to pay dues, is where "membership was not available to the employee on the same terms and conditions generally applicable to other members." 29 U.S.C. § 158(a)(3), 2d proviso, pt. (A). Thus, membership need not be formally denied for a compulsory unionism agreement to be unenforceable, but only unavailable "on the same terms and conditions generally applicable to other members." Membership was not available to the employees disciplined here on the same terms and conditions as other members, since the Boilermakers denied these employees the rights that all other members have to hold union office and to attend all union meetings and functions, App. B at 39a-40a.

The court of appeals' panel argued that membership "was offered" to the disciplined employees "on the same terms as it was to other employees," because they were "disciplined just as any other member would have been" for violating the obligations of membership. App. A at 10a. That misses the point: once membership is substantially impaired it is ***no longer*** "available to the employee on the same terms and conditions generally applicable to other members," 29 U.S.C. § 8(a)(3), 2d proviso, pt. (A), as the Board recognized in both *McGraw Edison* and *Machinists District 94*.

Membership rights were lawfully substantially impaired in both *McGraw Edison*, 181 N.L.R.B. at 992, 994, and *Machinists District 94*, 283 N.L.R.B. at 892 & n.44, for failure to obey valid union rules imposing obligations on all members. Yet, in both cases, the Board nonetheless "consider[ed] as unlawful and 'a continuing form of coercion,' which restrain[ed] the exercise of

Section 7 rights, the labor organization's continued insistence on payment of dues or the equivalent thereof during the period of the membership impairment" imposed as discipline for violation of those rules. *Machinists District 94*, 283 N.L.R.B. at 892; *see McGraw Edison*, 181 N.L.R.B. at 992, 994-96.

The second circumstance defined in section 8(a)(3)'s second proviso, under which an employee may not lawfully be discharged for failure to pay dues, is where "membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues . . . uniformly required as a condition of acquiring or retaining membership." 29 U.S.C. § 158(a)(3), 2d proviso, pt. (B). This case falls under this prohibition, as well as that of part (A) of the second proviso, because denial of the rights to hold any union office and attend any union functions, except meetings at which a vote on a contract affecting the disciplined employees would occur, effectively was a complete denial of membership. In *McGraw Edison*, the Board treated a similar substantial disciplinary impairment of membership as a **denial** of membership "for a reason other than the failure to pay dues" and thus subject to part (B) of the second proviso to section 8(a)(3). *See* 181 N.L.R.B. at 994; *see also Communications Workers Local 9509*, 193 N.L.R.B. 83, 84 (1971) (case involving expulsion is "analogous" to one involving significant impairment of membership rights).[5]

The court of appeals' decision insisted that part (B) does not apply to this case, because the employees' "membership was never 'denied' or 'terminated,'" and the discipline "was merely an *incident of [their] continued membership*." App. A at 11a. That is a hyper-technical distinction. When "membership is denied

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[5] There is no question that the employees' membership rights were substantially impaired here, despite the court of appeals' panel's scepticism on the point, *see* App. A at 11a. The Board found that "the Respondent had imposed discipline on [these employees] that substantially impaired their membership rights." App. B at 19a.

or terminated" for reasons other than nonpayment of dues, 29 U.S.C. § 158(a)(3), 2d proviso, pt. (B), and dues are still collected, the invidious practice is not the denial of the title "member." It is the "depriv[ation] . . . ***of the rights attendant [to]*** full membership." *Dillingham Tug & Barge Corp.*, 278 N.L.R.B. 83, 86 (1986) (emphasis added); *see NLRB v. Pipefitters Local 120*, 719 F.2d 178, 184 (6th Cir. 1983).

Therefore, part (B) of section 8(a)(3)'s second proviso applies where membership is "merely" suspended, though that is not literally denial or termination of membership. *See Dillingham Tug*, 278 N.L.R.B. at 86. It also must apply to a substantial impairment of membership. Otherwise, unions will be free to evade that part of the proviso by, as the Boilermakers did here, impairing all or most meaningful membership rights, leaving employees members in name only.

In short, *McGraw Edison* and its progeny correctly answered the question left open by this Court in *General Motors*. The *McGraw Edison* rule is the only rule consistent with the structure and terms of the Act. The Court should grant a writ of certiorari here to make it plain that the court of appeals erred in permitting the Board to jettison that longstanding rule without explanation.

II. The Court of Appeals' Decision Directly Conflicts with The Decisions of Two Other Circuits and Is Inconsistent With the Act's Policy of Voluntary Unionism Recognized By This Court in *Pattern Makers* and *Beck*

The court of appeals' panel grounded its decision on a concern that a rule prohibiting a union from enforcing a compulsory unionism provision "against its members, merely because they were subjected . . . to routine internal discipline, would create a free rider out of every union member who was subjected to lawful discipline for violating valid union rules and who no longer desired to pay dues." App. A at 18a. That concern was rejected explicitly by the Second Circuit in *Communications Workers Local 1104 v. NLRB*, 520 F.2d 411 (2d Cir. 1975), *cert.*

denied, 423 U.S. 1051 (1976), and implicitly by the Sixth Circuit in *NLRB v. Pipefitters Local 120*, 719 F.2d 178 (6th Cir. 1983).

Those cases are both on point with this. In both, the courts of appeals enforced Board orders finding that a union violated section 8(b)(1)(a) by enforcing a compulsory unionism provision against employees who had been denied union membership, in *Communications Workers Local 1104* as lawful discipline for supporting a rival union, and in *Pipefitters Local 120* for arbitrary reasons.

In *Communications Workers Local 1104*, 520 F.2d at 420, the union argued, like the panel here, "that enforcement of the Board's order would violate fundamental national labor policy in that it would render unions . . . helpless to prevent free riders from enjoying the benefits of union representation while avoiding their fair share of the costs." The Second Circuit rejected this argument:

> The only free riders will be those who . . . are lawfully excluded from the union for activity that, though protected by § 7, is disloyal to the union. And if the number of such employees rises to the point where the lack of their dues becomes serious, the union will most likely be suffering from problems greater than free riders. Thus, while our decision necessarily entails some inroads on a union's ability to protect itself from free riders, the invasion is not serious. ***A contrary decision would create far greater problems of compulsory unionism, the elimination of which is as much a part of national labor policy as is the competing goal of protecting unions from free riders.***

Id. (emphasis added).

Similarly, the Sixth Circuit, citing *Communications Workers Local 1104*, held in *Pipefitters Local 120*, 719 F.2d at 184 (emphasis added), that "the Board's ruling that a union violates

§ 8(b)(1)(A) by assessing dues and fees from an employee while affirmatively denying union membership is a ***fair*** and reasoned application of the Act." The court saw this result as fair, not because the employees were technically denied the status of member, but because the denial of membership deprived them of the significant ***rights*** of membership, such as "attend[ing] union meetings . . . [and] participat[ing] in other internal union affairs," *id.*, rights that the Boilermakers denied the disciplined employees here.

The reasoning of the Second and Sixth Circuits—but not that of the panel in this case—is consistent with this Court's most recent pronouncements of the NLRA's policy regarding compulsory unionism. Thus, in *Pattern Makers*, 473 U.S. at 104-05, 114, the Court explicitly recognized that a "congressional policy of voluntary unionism" is "implicit in § 8(a)(3)" of the Act.

With due respect to the panel, *Communications Workers v. Beck*, 487 U.S. 735 (1988), did ***not*** "ma[k]e clear that unions need not tolerate free riders," App. A at 11a, in these circumstances. *Beck* did not involve, or even discuss in *dicta*, whether unions may lawfully compel compulsory dues payments from employees whose membership rights are denied or significantly impaired.

Moreover, *Beck*, 487 U.S. at 755 (quoting S. Rep. No. 105, 80th Cong., 1st Sess., pt. 2, at 8 (1947)) (emphasis added), relied on the principle that the NLRA "provide[s] ***only the most grudging*** authorization of [union-security] agreements, permitting 'union-shop agreement[s] only under ***limited*** and administratively burdensome conditions.'" That principle is consistent with the *McGraw Edison* rule as enunciated by the Board before this case, and with the decisions of the Second and Sixth Circuits in *Communications Workers Local 1104* and *Pipefitters Local 120*. However, that underlying principle of *Beck* is ***inconsistent*** with the decisions of the Board, overruling the *McGraw Edison* rule *sub silentio*, and the panel, limiting that rule, in this case.

In sum, a second reason for granting certiorari here is to establish uniformity among the circuits on the important question left open in *General Motors*. This Court's intervention is necessary to ensure that the answer to that question is consistent with the policy of voluntary unionism that underlies the Act, as interpreted by the Court in *Pattern Makers* and *Beck*.

III. The Court of Appeals' Decision Conflicts with Decisions Of This Court and Other Courts of Appeals Insofar as It Held That the Employees' Dissident Free Speech Activities Were Not Protected by Section 7 of the Act

Besides the validity of the *McGraw Edison* rule, this case presents another important question under the NLRA. That second question is whether the right of employees to self-organization and to refrain from union activities, guaranteed in section 7 of the NLRA, protects employees' efforts to convince the membership of their local to remove positions from a bargaining unit represented by a union that they oppose.

The court of appeals' panel cryptically held that "the Board properly concluded that Gilbert's conduct did not involve one of [the] so-called 'fundamental' section 7 rights." App. A at 15a.[6] Because the panel did not explain this holding, it is not clear whether it considered all section 7 rights "fundamental," but viewed the conduct of Gilbert and the three other employees disciplined with him as not the exercise of a section 7 right, or considered the section 7 right that protected their conduct as not

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[6] In fact, the Board itself did not decide whether § 7 protects the conduct for which discipline was imposed here. Instead, the Board assumed that whether the discipline was "aimed at a Section 7 right" was irrelevant. *See* App. B at 24a. The ALJ did rule that the employees' conduct was not protected by § 7, but without explanation. He simply assumed, *ipse dixit* and illogically, that, because he held that the discipline did not violate the Act, the conduct was unprotected. *See id.* at 53a.

"fundamental."[7] In either event, the decisions of this Court, other courts of appeals, and the Board establish that the employees' conduct was the exercise of a "fundamental" section 7 right, the right of self-organization.

The Boilermakers disciplined Gilbert and the other employees for presenting and supporting a resolution at a union meeting, and circulating a petition, in an effort to convince the membership of their local to agree to remove certain positions from their bargaining unit. App. A at 5a-6a; App. B at 50a. As the union argued in *Transportation Workers Local 525*, App. F at 72a, this conduct "clearly was protected" by section 7. Self-evidently, these were dissident intra-union free speech activities. *See* 29 U.S.C. § 411(a)(2) (1988) (guaranteeing freedom of speech at union meetings); *cf. Hendricks County Rural Elec. Membership Corp. v. NLRB*, 603 F.2d 25, 27 (7th Cir. 1979) (§ 7 protects circulation of a petition on a matter of labor-management relations).

The Board and the federal courts have long held that section 7 protects dissident intra-union activities:

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[7] The former would have to be true under the Board's formulation of the *McGraw Edison* rule in *Transportation Workers Local 525*, App. F at 77a, which literally applies to all section 7 rights, not just "fundamental" section 7 rights: "The Board in the [*McGraw Edison* line of] cases outlined above has made it clear a union may not invoke a union-security clause of a collective-bargaining agreement against an employee whose full union membership has been significantly impaired due to the exercise of Section 7 rights." *See also Telephone Traffic Union*, 241 N.L.R.B. 826, 826 n.3 (1979) (quoting *Communications Workers Local 1104*, 211 N.L.R.B. 114, 116 (1974), *enforced*, 520 F.2d 411 (2d Cir. 1975), *cert. denied*, 423 U.S. 1051 (1976)) (the *McGraw Edison* rule applies to "***all*** situations 'where membership is denied or impaired because of employees' exercise of rights guaranteed them under Section 7 of the Act'") (emphasis added).

> Among the rights, which are guaranteed by the latter section of the Act to employee-members vis-a-vis their representative labor organizations, is the "privilege to protest and to question the wisdom of their bargaining representative and to persuade others or take such steps as they deem necessary to align their union with their position" and such so-called dissident activities have long been so held by the Board.

Laborers Local 806, 295 N.L.R.B. 941, 957 (1989) (quoting *East Texas Motor Freight*, 262 N.L.R.B. 868, 871 (1982)), *enforced*, 974 F.2d 1343 (9th Cir. 1992) (table); *see, e.g., Helton v. NLRB*, 656 F.2d 883, 887 & n.31 (D.C. Cir. 1981).

Dissident union activities need not involve access to the Board's processes to be protected by section 7 and fall within the *McGraw Edison* rule, as the court of appeals' panel apparently, and erroneously, thought, *see* App. A at 14a-15a. For example, "strikebreaking" has nothing to do with the Board's processes. Yet, this Court has held that section 7 protects "strikebreaking." *Pattern Makers*, 473 U.S. at 101. And, the Second Circuit and the Board have held that a union violates section 8(b)(1)(A) if it insists on compliance with a compulsory unionism agreement by an employee whose membership it has denied or substantially impaired for "strikebreaking." *Communications Workers Local 1104*, 520 F.2d at 414, 418-19; *Machinists District 94*, 283 N.L.R.B. at 892-93.

The right to engage in dissident activities "is inherent in the employee's right to self-organization as guaranteed by Section 7 of the Act," *Roadway Express, Inc.*, 108 N.L.R.B. 874, 875 n.3 (1954), *enforced sub nom. Teamsters Local 823 v. NLRB*, 227 F.2d 439 (10th Cir. 1955). Moreover, that right is fundamental to the Act:

> One of the principal policies of the national labor laws—that embodied in section 7—is the protection of the exercise by workers of full freedom of association,

> self-organization, and designation of representatives of their own choosing for the purpose of negotiating the terms and conditions of their employment.

Carpenters Local 1846 v. Pratt-Farnsworth, Inc., 690 F.2d 489, 512 (5th Cir. 1982), *cert. denied*, 464 U.S. 932 (1983); *see* 29 U.S.C. §§ 141(b), 151; *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 280 (1956).

Indeed, ***all*** section 7 rights are fundamental to the Act, not just the right of access to the processes of the Board. As the Board reasoned in *Communications Workers Local 1104*, 211 N.L.R.B. at 116-17 (emphasis added) (quoting *McGraw Edison*, 181 N.L.R.B. at 992),

> it is hardly necessary to cite authority for the proposition that a primary function of the Board has been to protect Section 7 rights. . . . Accordingly, **if the Board deems it necessary to protect the right of "providing unimpeded access to its procedures and remedies," as it stated in *McGraw Edison*, . . . in effectuating the policies of the Act, the Board is equally obligated to protect the rights of employees arising under Section 7 of the Act**.

Thus, a fundamental section 7 right protected the conduct for which the Boilermakers disciplined the employees here. Consequently, the court of appeals erred in concluding that this case does not fall within the *McGraw Edison* rule because of the nature of the employees' conduct. This Court should grant certiorari to settle the conflict between the court of appeals' cramped interpretation of section 7 and the more expansive construction given it by this Court, other courts of appeals, and the Board in prior cases.

CONCLUSION

This case presents issues that have great significance to the respective rights of individual employees and unions under the NLRA. It also presents a direct conflict between the court of appeals' decision and the decisions of the Second and Sixth Circuits in *Communications Workers Local 1104* and *Pipefitters Local 120* on a question left open by this Court in *General Motors*. The Court should grant this petition to settle where the line properly lies between the individual rights of employees and the institutional interests of unions, and to end the conflict among the courts of appeals.

Respectfully submitted,

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APPENDICES

APPENDIX A

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

June 16, 1995

[56 F.3d 1438]

James GILBERT, Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, Respondent,

**International Brotherhood of Boilermakers,
Iron Ship Builders, Blacksmiths,
Forgers and Helpers, AFL–CIO, Intervenor.**

No. 94–1081.

United States Court of Appeals,
District of Columbia Circuit.

Argued March 13, 1995.

Decided June 16, 1995.

* * * *

[1440]Before: EDWARDS, C.J., and WILLIAMS and ROGERS, Circuit Judges.

Opinion for the Court filed by Chief Judge EDWARDS.

HARRY T. EDWARDS, Chief Judge:

In 1988, petitioner James Gilbert was president of Local D–100 of the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers ("Boilermakers" or "Union"), which represented a unit of employees at the Kaiser Cement Corporation ("Company") in California. During that year, Gilbert and several other members of the local advocated certain proposals that would have undermined the strength of the Union within the bargaining unit. Charges were filed against Gilbert and the other dissident members, and, upon finding them guilty, the

Union barred them from holding any Union office or attending most Union meetings for several years. Although Gilbert and the other officers never resigned their membership in the Union, they asserted that, because of the discipline imposed on them, they were no longer obligated to pay membership dues. When Gilbert stopped paying his dues, the Union threatened to have him discharged from his employment with the Company pursuant to a union-security agreement between the Union and the Company, requiring bargaining unit employees to pay Union dues as a condition of continued employment.

Gilbert thereafter filed an unfair labor practice charge against the Union with the National Labor Relations Board ("NLRB" or "Board"), alleging that the Union's threat to seek his discharge under the union-security agreement violated the National Labor Relations Act ("NLRA" or "Act"). The Board dismissed Gilbert's complaint, holding that the Union did not violate section 8(b)(1)(A) of the Act, 29 U.S.C. § 158(b)(1)(A) (1988), by demanding that he pay dues. The Board found that, because the disciplinary action itself did not violate the Act, Gilbert remained obligated under the union-security agreement to pay "periodic dues and the initiation fees uniformly required." *Id.* § 158(a)(3) (1988). Accordingly, the Board concluded that the Union acted lawfully when it gave Gilbert a choice to either pay membership dues or sacrifice his job pursuant to the union-security agreement.

Gilbert raises two challenges to the Board's decision. First, he contends that the result reached by the Board is impermissible under the second proviso to section 8(a)(3) of the Act, which prohibits a union from enforcing a union-security provision against an employee (1) if union membership is not "available" to that employee on the same terms applicable to other employees, or (2) if the employee's membership is "denied or terminated" for reasons other than the nonpayment of membership dues. *Id.* Second, he claims that the Board's decision is arbitrary and capricious, because it constitutes an unexplained departure from a line of Board precedent holding that a union violates section 8(b)(1)(A) of the Act if it requires the payment of dues as a condition of employment when the union has

imposed certain types of discipline on an employee for exercising a right guaranteed by section 7 of the Act, *id.* § 157 (1988).

We reject both contentions. First, the Union's actions in this case clearly did not violate the second proviso to section 8(a)(3). That proviso protects employees from discharge under a union-security agreement only when membership was not "available" to such employees on the same terms as other employees, or when the membership of such employees has been "denied or terminated" for any reason other than nonpayment of dues. In this case, Gilbert's membership was always "available" to him on the same terms as other employees, for the Union never imposed any conditions on Gilbert's membership that were not applicable to other members. Moreover, Gilbert's membership was never "denied or terminated," because he never ceased being a member of the Union during the relevant period. Rather, the discipline imposed on him was merely a *lawful incident of his continued membership* in the Union, imposed for violating rules that applied to every other Union member. Furthermore, because we find that the Board's dismissal of Gilbert's complaint in this case is consistent with NLRB precedent, we reject Gilbert's contention that the Board's decision **[1441]**was arbitrary and capricious. Accordingly, we deny the petition for review.

I. BACKGROUND

A. Union-Security Agreements Under the NLRA

Although section 8(a)(3) of the NLRA generally makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment ... to encourage or discourage membership in any labor organization," *see* 29 U.S.C. § 158(a)(3), that section contains two provisos authorizing union-security agreements between employers and unions. The first proviso authorizes a union and an employer to contract to require as a condition of employment that all employees in the bargaining unit establish and maintain "membership" in the union. *Id.* The second proviso requires that such membership must, *inter alia*, be equally available to all and obligate employees to do no more than "tender

the periodic dues and the initiation fees uniformly required." *Id.* Thus, under established law, section 8(a)(3) has been construed to allow an employer and the employees' exclusive bargaining representative to enter into an agreement requiring all employees in the bargaining unit to pay periodic union dues and initiation fees as a condition of continued employment, whether or not the employees wish to become full union members.

Despite the broad meaning that might be implied by the term "membership" in the first proviso of section 8(a)(3), the Supreme Court has held that the section's second proviso mandates that such union membership is "whittled down to its financial core." *NLRB v. General Motors Corp.*, 373 U.S. 734, 742, 83 S.Ct. 1453, 1459, 10 L.Ed.2d 670 (1963); *see International Union of Elec., Elec., Salaried, Mach. & Furniture Workers v. NLRB*, 41 F.3d 1532, 1534 (D.C.Cir.1994) ("*IUE v. NLRB*"). Accordingly, "[i]t is well settled that causing or attempting to cause an employer to discharge an employee for breach of any union membership requirements other than failure to pay the financial core obligations of uniform initiation fees and dues violates the Act, specifically sections 8(b)(2) and 8(b)(1)(A)."[1] *IUE v. NLRB*, 41 F.3d at 1534 (citing *Union Starch & Ref. Co.*, 87 N.L.R.B. 779, 787 (1949), *enforced*, 186 F.2d 1008 (7th Cir.), *cert. denied*, 342 U.S. 815, 72 S.Ct. 30, 96 L.Ed. 617 (1951)). In its most recent decision in this area, *Communications Workers v. Beck*, 487 U.S. 735, 745, 108 S.Ct. 2641, 2648, 101 L.Ed.2d 634 (1988), the Supreme Court held that section 8(a)(3) does not oblige employees "to support union activities beyond those germane to collective bargaining, contract administration, and grievance adjustment." The Court thus "limited employee

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[1] In this case, Gilbert charged the Union only with violating section 8(b)(1)(A), which makes it unlawful for a union "to restrain or coerce ... employees in the exercise of the rights guaranteed in [section 7 of the Act]." 29 U.S.C. § 158(b)(1)(A). Section 7 of the Act gives employees the right to engage in a range of activities in support of collective bargaining, but also gives employees "the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section [8(a)(3) of the Act]." *Id.* § 157.

obligations under union-security agreements to comport with the congressional purpose of eliminating the problem of 'free riders,' *i.e.*, employees who would receive the benefits of union representation but refuse to pay their fair share of the costs." *IUE v. NLRB*, 41 F.3d at 1535 (citing *Beck*, 487 U.S. at 747–54, 108 S.Ct. at 2649–53).

B. The Present Dispute

The facts in this case are not in dispute. Prior to 1984, Local 100 of the Cement, Lime, Gypsum and Allied Workers International Union ("Cement Workers") represented the relevant bargaining unit employees at the Company's Permanente, California facility. The collective bargaining representative for all bargaining unit employees at that facility was the AFL–CIO Building Trades Council. In April 1984, the Cement Workers merged with the Boilermakers, and Local 100 became Local D–100 of the Union.

Gilbert had been president of the local since 1977 and remained president after the merger. He and several other employees became dissatisfied with the Union when it terminated four long-term Cement Workers' **[1442]**international representatives. In a letter dated September 16, 1986, Gilbert requested that the termination of one of the fired international representatives be reconsidered, but the Union refused. Later, in July 1988, Gilbert prepared and circulated a petition requesting a Board election so that the bargaining unit employees could replace the Union with a new bargaining representative. All but one of the employees in the unit signed the petition, but it was never filed with the Board.

On September 22, 1988, at a meeting of Local D–100's membership, Gilbert presented a "Letter of Understanding" written by the Company, which proposed to convert the jobs of 17 unit employees, including Gilbert's, to salaried supervisory positions, thereby removing them from the bargaining unit. While Gilbert took no formal position on the proposal, he described the proposal's benefits as the Company had represented them. Local D–100 Financial Secretary Donald Hall attended the meeting, but also took no position on the proposal. Unit employee Arthur Rose spoke in

favor of it. The bargaining unit employees ultimately rejected the proposal by a vote of 23 to 11. About two weeks after the September 22 meeting, Joseph Gaxiola, a trustee of Local D–100, circulated a petition asking for the members' views on a proposal to make all bargaining unit positions salaried, thereby eliminating the unit. Gaxiola supported the proposal, but again a majority of the unit employees opposed it.

In October 1988, a bargaining unit employee filed internal Union charges against Gilbert, Hall, Rose, and Gaxiola, alleging that the four employees had engaged in activities in support of removing a number of persons from the bargaining unit. After a hearing before an international representative, the Union found the four employees guilty of all charges and subsequently barred them from holding any Union office or attending any Union meetings, except those called to vote on the ratification of a contract directly affecting them. These penalties were to apply to Gilbert for five years, Hall for three years, and Gaxiola and Rose for two years.

In April 1989, in a joint letter to Union president Charles W. Jones, the four disciplined employees asserted that they had been effectively suspended from the Union and therefore no longer were obligated to pay union dues. In a letter dated May 22, 1989, Jones responded that the four employees had not been suspended and must continue to pay dues in order to remain members of the Union in good standing. In a subsequent letter dated July 20, 1989, the disciplined employees inquired as to what penalties might be imposed on them if they stopped paying dues. Jones replied that the Union's contract with the Company contained a union-security clause and that, if the four employees ceased paying dues, the Union would so notify the Company, and the employees would no longer be permitted to work at the plant. Nevertheless, Gilbert stopped paying his dues for two months. He resumed payment, however, when the Company notified him that the Union had requested his discharge under the union-security agreement. Gilbert was thus never dismissed from his employment.

C. Board Proceedings

On October 6, 1989, Gilbert filed an unfair labor practice charge against the Union with the NLRB, and, on December 14, 1989, the General Counsel issued a complaint. The Administrative Law Judge ("ALJ") rejected the General Counsel's first contention that the Union had unlawfully disciplined Gilbert and the three other subject employees. He found that the Union had the right to protect itself against the activities of the four disciplined employees, which could have resulted in the erosion or elimination of the bargaining unit that the Union represented. *Kaiser Cement Corp.*, 312 N.L.R.B. 218, 227-28, 1993 WL 371612 (1993) ("NLRB Decision") (reprinting ALJ decision). Therefore, the ALJ concluded that the General Counsel had not established a *prima facie* case that the discipline violated section 8(b)(1)(A). *Id.* at 228, 1993 WL 371612. On this point, the judge noted that the Union's internal rules had been reasonably enforced against the four employees, who at all times were free to leave the Union to escape those rules, but had not done so. *Id.*

[1443]The ALJ next held that the Union did not violate the Act by threatening to invoke the union-security agreement. In this regard, the judge first found that the union's threat to invoke the agreement was lawful, because the employees had not been disciplined for the exercise of any rights protected by section 7 of the Act. *Id.* Because no section 7 rights were involved, the ALJ distinguished this case from cases relied on by the General Counsel, in which the Board held that a union violated section 8(b)(1)(A) of the Act by threatening to invoke a union-security clause against employees who had been disciplined in various ways for the exercise of certain section 7 rights. *Id.* (citing *Steelworkers Local 4186 (McGraw Edison Co.)*, 181 N.L.R.B. 992 (1970)).

Finally, the ALJ rejected the General Counsel's alternative argument that, even if the activities for which the subject employees were disciplined were not protected, their membership rights were so substantially reduced that enforcement of the union-security clause against them became unlawful. *Id.* This argument, in the ALJ's view, presented the Union with the "Hobson's choice" of

either forgoing its right to discipline members under the proviso to section 8(b)(1)(A),[2] thereby rendering that proviso a nullity, or relinquishing its right to enforce the provisions of a valid union-security agreement, thereby ultimately self-destructing without the dues of disciplined members. *Id.* The ALJ concluded that the General Counsel's position, if implemented, would induce any members who are unwilling to pay dues in the first place for financial or philosophical reasons to subject themselves to union discipline "so they would be 'punished,' by not having to pay union dues, although they would continue their employment." *Id.*

The Board affirmed. The Board first found that the Union had lawfully disciplined Gilbert and the other employees. *Id.* at 220, 1993 WL 371612. The Board initially noted that there are certain limitations on a union's right to discipline members. For instance, employee-members are always free to resign their membership, and thus escape union rules and discipline. However, the Board stated that employees who "have opted for continued membership ... cannot be heard to complain if the union enforces the rules of membership." *Id.* Another limitation on internal union discipline, the Board continued, is where a union rule "impairs a policy that Congress has embedded in the labor laws." *Id.* For example, a union may not discipline a member for exercising the "fundamental" section 7 right of seeking access to the Board (*i.e.*, filing a petition or charge with the Board). *Id.* In this case, however, the Board found no such fundamental policy implicated by the disciplined members' actions. The Board also found that Gilbert and the others were at all times free to resign their membership, but chose not to do so. Thus, the Union was free to discipline them, and "[t]he fact that the Union chose to discipline them by impairing their membership, rather than by expelling them or fining them, does not transform lawful discipline into unlawful discipline." *Id.*

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[2] The proviso to section 8(b)(1)(A) provides that the prohibitions of that section "shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein." *Id.* §158(b)(1)(A).

The Board next held that the Union's enforcement of the union-security agreement against the employees whose membership lawfully had been impaired did not violate the Act. The Board stated that, "[b]ecause the [Union's] discipline of these members did not violate the Act, the members continued, as unit employees, to be required under the union-security agreement to satisfy the sole obligation a union may enforce under a union-security provision: the tendering of uniform initiation fees (if any) and dues." *Id.* (internal quotations and footnote omitted). The Board thus concluded that the Union "did not violate Section 8(b)(1)(A) of the Act by threatening to invoke the union-security clause against Gilbert and the three other employee-members if they ceased paying dues after the [Union] disciplined them." *Id.*

II. ANALYSIS

Gilbert challenges the Board's decision on two grounds. He initially claims that the result reached by the Board is impermissible [1444]under the second proviso to section 8(a)(3) of the Act. He next argues that the NLRB's decision is arbitrary and capricious, because the Board departed from its own precedent without adequate explanation. We reject both contentions.

A. NLRA Section 8(a)(3)

As noted above, a union's threat to invoke a facially valid union-security agreement to cause the discharge of an employee for any reason other than nonpayment of dues or initiation fees violates section 8(b)(1)(A) of the Act. *See IUE v. NLRB*, 41 F.3d at 1534. Gilbert contends that the result reached by the Board—that the Union did not violate the Act by threatening to invoke the union-security agreement unless Gilbert paid his union dues—was impermissible under the second proviso to section 8(a)(3). In making this argument, Gilbert first contends that the Union's discipline against him "substantially impaired" his membership rights, because he no longer was permitted to hold office in the Union, attend most Union meetings, or vote on most Union matters. This substantial impairment, Gilbert argues, placed him squarely within both of the conditions set forth in section 8(a)(3)'s second

proviso because: (1) membership was not "available" to him on the same terms and conditions as other employees; and (2) his membership had been effectively "denied or terminated" for reasons other than nonpayment of periodic dues uniformly required. Accordingly, Gilbert concludes, the Union's threat to enforce the union-security agreement against him (unless he paid his dues) violated section 8(a)(3), and was thus an unfair labor practice under section 8(b)(1)(A).

The Board rejected Gilbert's contention, finding that he remained obligated under the union-security agreement to pay dues after he was disciplined, and concluding that the Union's threat to invoke the union-security agreement unless he paid those dues did not violate the Act. We agree. In reviewing the Board's decision, we must accept the NLRB's reasonable construction of section 8(a)(3). *See Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–43, 104 S.Ct. 2778, 2781, 81 L.Ed.2d 694 (1984). We also must uphold the Board's factual findings if, viewing the record as a whole, they are supported by substantial evidence. *See IUE v. NLRB*, 41 F.3d at 1536–37. Here, we conclude that the Board's decision is based on a reasonable construction of section 8(a)(3) and is supported by substantial record evidence.

First, with respect to the first condition of section 8(a)(3)'s second proviso, the mere fact that Gilbert was deprived of certain membership privileges as discipline for violating valid internal Union rules that applied uniformly to every other member[3] does not mean that membership was not "available" to Gilbert on the same terms and conditions as other employees. Membership was offered to Gilbert on the same terms as it was to other employees. This membership, however, included both rights and obligations. When Gilbert freely chose to violate his obligations, he was disciplined just as any other member would have been. And nothing in the

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[3] Gilbert does not dispute that the Union's internal rules were valid and applied uniformly to all members.

record suggests that other members found guilty of similar violations of the Union's internal rules were punished less severely than Gilbert. Absent any such evidence, the only reasonable conclusion is the one reached by the Board—membership in the Union was "available" to Gilbert on the same terms and conditions as it was to other employees.

It is equally clear that the Union's impairment of Gilbert's membership rights did not place him within the second condition to section 8(a)(3)'s second proviso. This part of the proviso protects employees from discharge under a union-security agreement if their union membership is "denied or terminated" for any reason, however lawful, other than nonpayment of dues. 29 U.S.C. §158(a)(3). However, even accepting Gilbert's characterization that his membership rights were "substantially impaired" for reasons other than nonpayment of dues, the fact remains that his Union membership was never "denied" or "terminated." Gilbert was **[1445]**specifically told by the Union following his discipline that his membership had not been suspended, and Gilbert chose not to resign his membership. Gilbert thus remained at all relevant times a full member of the Union. The discipline imposed on him was merely an *incident of that continued membership* in the Union. Moreover, the Board's decision not to equate the discipline imposed on Gilbert with a "denial" or termination" within the meaning of the final proviso to section 8(a)(3) is clearly reasonable.

Furthermore, Gilbert's contention that a union may not lawfully compel the payment of dues from a member against whom the union has imposed lawful discipline flies in the face of the Supreme Court's decision in *Beck*. While the Court in *Beck* held that unions may not, pursuant to union-security agreements, exact from unwilling employees sums used to finance activities that go beyond the union's collective bargaining and representational obligations, 487 U.S. at 745, 108 S.Ct. at 2648, the Court made clear that unions need not tolerate free riders, *i.e.*, employees who would receive the benefits of union representation but refuse to pay their fair share of the costs, *id.* at 750, 108 S.Ct. at 2651 ("Congress' decision to allow union-security agreements *at all* reflects its concern that ... the parties to a collective bargaining agreement be

allowed to provide that there be no employees who are getting the benefits of union representation without paying for them.") (internal quotations omitted). Yet, free riders are exactly what Gilbert urges this court to sanction. Under Gilbert's theory, an employee would be free to avoid his or her financial obligation to a union merely by flouting the union's rules, submitting to discipline similar to that imposed on Gilbert, and then refusing to pay any membership dues on the ground that his or her membership rights had been "substantially impaired." Remaining in the bargaining unit, such an employee still would be entitled to the benefits of union representation, but would not be required to pay dues. Such a result is surely inconsistent with *Beck*.

B. Prior Board Precedent

Gilbert next contends that, even if the result reached by the Board is permissible under section 8(a)(3), the Union's actions in this case still violated section 8(b)(1)(A). Gilbert points to a line of authority, beginning with *Steelworkers Local 4186 (McGraw Edison Co.)*, 181 N.L.R.B. 992 (1970), holding that unions may not demand, on pain of discharge under a union-security agreement, that members who have been subjected to certain types of discipline for activity protected by section 7 of the Act continue to pay dues. Thus, according to Gilbert, the Board's determination in this case that there was no violation of section 8(b)(1)(A) is arbitrary and capricious, because it constitutes an unexplained departure from the Board's prior decisions. We disagree.

It is, of course, elementary that an agency must conform to its prior decisions or explain the reason for its departure from such precedent. *See Greater Boston Tel. Corp. v. FCC*, 444 F.2d 841, 852 (D.C.Cir.1970) ("[A]n agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored, and if any agency glosses over or swerves from prior precedents without discussion it may cross the line from the tolerably terse to the intolerably mute.") (footnote omitted), *cert. denied*, 403 U.S. 923, 91 S.Ct. 2229, 29 L.Ed.2d 701 (1971); *see also Motor Vehicle Mfrs. Ass'n v. State*

Farm Mut. Auto. Ins. Co., 463 U.S. 29, 57, 103 S.Ct. 2856, 2874, 77 L.Ed.2d 443 (1983). However, as we stated in *Hall v. McLaughlin*, 864 F.2d 868, 872 (D.C.Cir.1989), "[w]here the reviewing court can ascertain that the agency has not in fact diverged from past decisions, the need for a comprehensive and explicit statement of its current rationale is less pressing." We further noted in *Hall* that, where the circumstances of the prior cases are sufficiently different from those of the case before the court, an agency is justified in declining to follow them, and the court may accept even a "laconic explanation as an 'ample' articulation of its reasoning." *Id.* at 873 (citing *United Mun. Distribs. Group v. FERC*, 732 F.2d 202, 211 (D.C.Cir.1984)); see also *West Coast Media, Inc. v. FCC*, 695 F.2d 617, 621 (D.C.Cir. 1982) (holding that agency had engaged in "eminently reasonable" decision-**[1446]**making when it distinguished an asserted precedent by merely reciting factual differences between prior case and one before it), *cert. denied*, 464 U.S. 816, 104 S.Ct. 74, 78 L.Ed.2d 87 (1983). We thus concluded that, "if the court itself finds the past decisions to involve materially different situations, the agency's burden of explanation about any alleged 'departures' is considerably less." *Hall*, 864 F.2d at 873; *see also New England Grain & Feed Council v. ICC*, 598 F.2d 281, 285 (D.C.Cir.1979) ("While we are somewhat disturbed by the Commission's failure to explain why [an asserted precedent] is inapplicable here, that case is sufficiently distinguishable to assure that the Commission's oversight does not present a danger that it has arbitrarily departed from its own precedents."). Following this rationale, we recently held that an agency "may distinguish precedent simply by emphasizing the importance of considerations not previously contemplated, and that in so doing it need not refer to the cases being distinguished by name." *Environmental Action v. FERC*, 996 F.2d 401, 411-12 (D.C.Cir.1993).

Applying these standards to the case at hand, we find that the decision of the Board must be upheld. Gilbert argues that this case is controlled by a line of six Board decisions beginning with *McGraw Edison*, and culminating with *Machinists District 94 (McDonnell Douglas)*, 283 N.L.R.B. 881, 1987 WL 89622 (1987). As noted above, these cases have held, under varying factual circumstances, that a union violates section 8(b)(1)(A) of the Act by

invoking a lawful union-security clause to enforce the payment of dues where employees have been subjected to certain types of discipline for exercising a right guaranteed by section 7 of the Act. However, because all but one of these cases are "sufficiently distinguishable" from the case at hand, and because we can discern the path of the Board's position, we are satisfied that the Board has not departed from its precedent. With respect to the one case cited by Gilbert that is arguably on point, *McDonnell Douglas*, we find that the Board's decision here provided adequate reasoning for and notice of the Board's departure from that case.

First, the *McGraw Edison* line of cases all involved unions' discipline of members for exercising rights guaranteed under section 7 of the Act. Indeed, if no section 7 rights had been involved, the Board in *McGraw Edison* and its progeny could not have found violations of section 8(b)(1)(A), because that section creates an unfair labor practice only when a union restrains or coerces an employee "in the exercise of the rights guaranteed in [section 7]." 29 U.S.C. § 158(b)(1)(A). In this case, however, the ALJ found that Gilbert was disciplined for activity that did not constitute conduct protected by section 7. NLRB Decision, 312 N.L.R.B. at 228 ("I have found that the alleged discriminatees were not disciplined for the exercise of any rights protected by Section 7 of the Act."). Based on this conclusion, the ALJ properly held that the *McGraw Edison* line of cases are inapplicable. In affirming the ALJ's findings and conclusions, the Board did not take issue with the ALJ's conclusion that the activity resulting in Gilbert's discipline was not conduct protected by section 7. *See id.* at 218-20. Obviously, if the Board meant to say that section 7 rights were not involved here—and there is no reason to believe that they meant to say otherwise—then *McGraw Edison* and its progeny are inapplicable to this case.

In any event, it seems quite clear that *McGraw Edison* is inapposite. In *McGraw Edison*, 181 N.L.R.B. at 992, the union disciplined an employee *for filing a decertification petition* with the Board. When the employee indicated his intention not to pay dues after the significant impairment of his membership rights (the union had suspended his rights to attend union meetings for over one year

and barred him from holding office indefinitely), the union threatened to invoke a union-security clause to enforce payment of the dues. *Id.* The Board held that the union's threat violated section 8(b)(1)(A), because it "constituted a continuing form of coercion tending to operate as a serious restraint upon access to Board processes." *Id.* In this case, the Board stated that the right of seeking access to the Board is a "fundamental" section 7 right, because all other rights under the Act are dependent on it. NLRB Decision, 312 N.L.R.B. at 220 & n. 7. **[1447]**However, the Board properly concluded that Gilbert's conduct did not involve one of those so-called "fundamental" section 7 rights.

Moreover, four of the five post-*McGraw Edison* cases relied on by Gilbert are clearly distinguishable from this case. In each of those four cases, the union sought to enforce a union-security clause on employees who had either been *denied* membership, *see Communications Workers Local 1104 (New York Tel. Co.)*, 211 N.L.R.B. 114, 116–17, 1974 WL 5130 (1974), *enforced*, 520 F.2d 411 (2d Cir.1975), *cert. denied*, 423 U.S. 1051, 96 S.Ct. 778, 46 L.Ed.2d 639 (1976), *expelled* from membership, *see Communications Workers Local 9509 (Pacific Tel. & Tel. Co.)*, 193 N.L.R.B. 83, 83 (1971), or fully *suspended* from membership, *see Inland Boatmen's Union (Dillingham Tug & Barge Co.)*, 276 N.L.R.B. 1261, 1262-66, 1985 WL 46305 (1985), *further proceedings*, 278 N.L.R.B. 83, 1986 WL 54066 (1986); *Telephone Traffic Union (New York Tel. Co.)*, 241 N.L.R.B. 826, 827, 1979 WL 8958 (1979), for engaging in various section 7 activities. Thus, each of these cases involved situations in which a union stripped an employee-member of all rights and privileges of union membership. However, no such situation is involved here, for in this case the Union merely imposed routine discipline on an employee who voluntarily retained his membership in the union.[4] Thus, the

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[4] The critically different nature of the discipline involved in these post-*McGraw Edison* cases is also evidenced by the additional unfair labor practice findings made in those cases. In all but one of these cases, the Board held that, in addition to violating section 8(b)(1)(A), the union had also violated sections 8(a)(3) and 8(b)(2). *See Dillingham Tug & Barge*, 276 N.L.R.B. at 1271, 1985 WL 46305; *New York Telephone*, 211 N.L.R.B. at 116–18, 1974 WL 5130; *Pacific*

Board's failure to address these cases in its opinion can hardly be deemed an unexplained "departure" from precedent, because the rule of these cases is simply inapplicable to the case before us.[5]

Finally, the only post-*McGraw Edison* case cited by Gilbert that is arguably on point is *Machinists District 94 (McDonnell Douglas Corp.)*, 283 N.L.R.B. 881, 1987 WL 89622 (1987). In affirming an ALJ's decision, the Board in *McDonnell Douglas* held that a union violated section 8(b)(1)(A) of the Act when it threatened to invoke (for nonpayment of dues) a union-security agreement against several employees who had been forbidden by the union from holding union office for five years as discipline for engaging in certain section 7 activities. *Id.* at 892–93. Thus, the Board appeared to extend the holding of *McGraw Edison* and its progeny to a case where the union's discipline resulted in only the substantial impairment of an

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Telephone, 193 N.L.R.B. at 83–84. The unions' actions in these cases fell within the literal language of section 8(a)(3)'s second proviso, the Board found, because the unions had invoked or threatened to invoke union-security agreements against employees whose membership had been "denied" or "terminated" for reasons other than failure to pay dues. On this point, while the employees in *Dillingham Tug & Barge* were technically "suspended" for 15 years, the Board found that this was the practical equivalent of expulsion or termination for purposes of sections 8(a)(3) and 8(b)(2). 278 N.L.R.B. at 85–86, 1986 WL 54066. Under this rationale, even though no section 8(a)(3) and 8(b)(2) violations were alleged in the fourth case, *Telephone Traffic Union*, 241 N.L.R.B. at 827, 1979 WL 8958, the union's one-year full suspension of the employee in that case would have supported a finding of a violation of those sections. Thus, each of these post-*McGraw Edison* cases involved action of a fundamentally different nature from that involved in the case before us. The action in those cases was sufficient to find a violation of sections 8(a)(3) and 8(b)(2), but, as we have already held, the discipline involved in this case clearly did not amount to the "denial" or "termination" of membership necessary to support such a finding. While this fact is not dispositive of the issue before us, it obviously supports our conclusion that the post-*McGraw Edison* cases cited above are entirely distinguishable from, and thus inapplicable to, the case at hand.

[5] Our conclusion is unaltered by the fact that two of these cases contained dicta suggesting that the holding of *McGraw Edison* might extend to cases where membership is "impaired," *see Telephone Traffic Union*, 241 N.L.R.B. at 826 n.3, 1979 WL 8958; *New York Telephone*, 211 N.L.R.B. at 116–17, 1974 WL 5130, for dicta does not create a rule.

employee's membership rights. *Id.* However, the Board's actual holding in *McDonnell Douglas* is of little moment here, because (1) the employees were disciplined for engaging in section 7 activities, and (2) the subject employees had actually resigned from the union prior to being disciplined. *Id.* at 885, 892–93, 1987 WL 89622. Where an employee **[1448]**has resigned from a union, the union has no power to discipline the former member. *See NLRB v. Textile Workers Local 1029*, 409 U.S. 213, 217, 93 S.Ct. 385, 387, 34 L.Ed.2d 422 (1972). Thus, it is hard to view *McDonnell Douglas* as an "impairment" case, as Gilbert would have it. Rather, it is really a case where the union improperly attempted to discipline employees who were no longer members. In short, *McDonnell Douglas* is clearly inapposite to this case.

Even if *McDonnell Douglas* is fairly viewed as an "impairment" case, we think the Board's decision in this case provided adequate reasoning for and notice of the Board's departure from that precedent. The contours of the Board's holding in this case are readily discernable—a union security clause may "be enforced against those whose membership has been *lawfully impaired.*" NLRB Decision, 312 N.L.R.B. at 220 (emphasis added). And when the case before us is read in conjunction with *McGraw Edison* and its progeny, we can discern the following rule: For a union lawfully to demand, as a condition of continued employment, the continued payment of dues from a member who has been disciplined, two conditions must be met: (1) the discipline imposed on the employee must not result in the denial, termination, or full suspension of the employee's membership, and (2) the discipline itself must not impair the exercise of a "fundamental" section 7 right (*e.g.*, the right of seeking access to the Board's processes).[6] *Id.* Thus, even though the Board never mentioned *McDonnell Douglas* by name, we can discern the Board's position based on its holding and reasoning in this case, which in relatively clear terms signals the Board's departure from any contrary rule that arguably might be gleaned from *McDonnell Douglas*. And, by emphasizing

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[6] Obviously, petitioner does not challenge the rule of *McGraw Edison* and its progeny, and we thus have no occasion to rule on it in this case.

that mere impairment of membership rights is insufficient in cases such as this to support an unfair labor practice finding under section 8(b)(1)(A), and by stressing the overriding importance of "fundamental" section 7 rights, the Board has adequately signaled the reasons for its changed position.

Furthermore, the Board's decision is eminently reasonable in light of the Supreme Court's decision in *Beck*.[7] *Beck*, in clear terms, permits unions to use union-security provisions to avoid the problem of free riders. A rule prohibiting a union from enforcing such a provision against its members, merely because they were subjected (as Gilbert was here) to routine internal discipline, would create a free rider out of every union member who was subjected to lawful discipline for violating valid union rules and who no longer desired to pay dues. Such a result is clearly inconsistent with the Act, specifically section 8(a)(3), and the Court's interpretation of the Act in *Beck*.

III. CONCLUSION

For the foregoing reasons, the petition for review is denied.

So ordered.

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[7] All of the *McGraw Edison* cases relied on by Gilbert were decided prior to *Beck*.

APPENDIX B

DECISION AND ORDER

OF THE

NATIONAL LABOR RELATIONS BOARD

September 20, 1993

DECISION AND RECOMMENDED ORDER

OF THE ADMINISTRATIVE LAW JUDGE

June 20, 1990

[312 N.L.R.B. 218]

International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, AFL–CIO (Kaiser Cement Corporation) ***and*** **James Gilbert.** Case 32-CB-3316

September 20, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

Exceptions to the judge's decision in this case[1] present the question of whether the Respondent Union has violated Section 8(b)(1)(A) of the Act by threatening four dissident employee-members with enforcement of the union-security clause if these employees discontinued paying membership dues after the Respondent had imposed discipline on them that substantially impaired their membership rights.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions as modified and to adopt the recommended Order.

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[1] On June 20, 1990, Administrative Law Judge Michael D. Stevenson issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief to the General Counsel's exceptions.

[2] In the section of his decision entitled "2. The Letter of Understanding," the judge found in the second and fifth paragraphs that James Gilbert, who then served as president of the Local Union, presented the Employer's proposed "Letter of Understanding" to the membership for their approval or rejection on September 9, 1988. The record shows, however, that the actual date was September 22 as the judge stated later in his decision.

The judge found that the Respondent did not unlawfully threaten to cause the Employer to discharge members James Gilbert, Donald Hall, Joseph Gaxiola, and Arthur Rose under the union-security clause if they discontinued paying membership dues. For the reasons fully discussed below, we adopt the judge's finding that the Respondent has not violated the Act here.

The record shows that before April 1984, Local 100 of the Cement, Lime, Gypsum and Allied Workers International Union (CL&G) represented the relevant bargaining unit employees at the Employer's Permanente, California facility. The collective-bargaining representative for all bargaining unit employees at that facility was the AFL–CIO Building Trades Council. In April 1984, CL&G merged with the Respondent and Local 100 became Local D-100 of the Respondent.

Charging Party James Gilbert served as the Local president both before and after the merger. Although Gilbert and other Local members had not favored the merger, it was not until 1986 that they began actively opposing the Respondent. Gilbert's dissatisfaction resulted in part from the Respondent's termination of four long term CL&G International representatives. On September 16, 1986, Gilbert wrote a letter to the Respondent's president, Charles W. Jones, asking that he reconsider the discharge of International Representative Kent Weaver. Jones refused.

Before the 1984 merger, the Employer had proposed removing four job classifications from the bargaining unit and making them nonunion. The membership voted to reject the proposal. During early 1987, Gilbert met with the Employer's officials to discuss the possibility of changing all 37 or 38 bargaining unit positions into nonunion salaried positions. No change in the unit composition resulted from these discussions.

In July 1988,[3] Gilbert prepared and circulated a petition to Local members stating:

> As members of Lodge D-100, employed at the Kaiser Permanente Cement Plant, we do not want the Boilermakers International Union to represent us and request an election by the NLRB to chose [sic] a new International Union to affiliate with.

All but one of the members signed the petition. Gilbert, however, did not submit the petition to the Respondent or file it with the Board.

On September 22, Gilbert conducted a membership meeting during which he presented a "Letter of Understanding" the Employer had prepared that would have removed 17 jobs, including Gilbert's, from the bargaining unit and made them salaried, supervisory positions. Although Gilbert testified that he did not favor dividing the bargaining unit, Gilbert repeated to the employees the benefits of the proposal as the Employer had represented them. Gilbert told the employees that pensions for supervisors were double those provided to unit employees under the collective-bargaining agreement. He also emphasized that the Employer had made a commitment that those employees remaining in the unit would receive preferential consideration for later vacancies in the 17 new supervisory positions created for former unit employees. Arthur Rose, who held no union office, attended the meeting and publicly expressed his support for the Employer's proposal. Donald Hall, who was the Union's financial secretary, also was present but took no position on this proposal. The employees eventually voted, 23 to 11, to reject the Employer's "Letter of Understanding."

About 2 weeks later, Joseph Gaxiola, an elected trustee for the Local, circulated a petition to the unit employees that sought to turn all the unit jobs into salaried positions and thereby eliminate this

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[3] All dates are in 1988, unless otherwise noted.

portion of the larger collective-bargaining unit represented by the AFL—CIO Building Trades Council. A majority of the unit employees opposed Gaxiola's petition.

[219]About October 16, James Ellsworth, another unit employee, filed internal union charges against Gilbert, Hall, Gaxiola, and Rose. Ellsworth charged that Gilbert "bargained with [the] company in order to disband the union and have the jobs [turned] into the salaried position [sic]"; that Hall and Rose "aided" or "abetted" Gilbert's "illegal activities"; and that Gaxiola circulated a petition seeking to eliminate the bargaining unit. About December 19, the Respondent found the alleged discriminatees guilty of all charges. As discipline for his misconduct, the Respondent suspended Gilbert from union office, barred him from holding any union office for a period of 5 years, and prohibited him from attending union meetings for 5 years "except a meeting at which a contract directly affecting him is to be voted upon." The Respondent imposed the same discipline on Hall except that it was for a period of 3 years. Gaxiola and Rose also received this discipline but for a 2-year period.

About April 24, 1989,[4] the four alleged discriminatees jointly wrote a letter to Charles W. Jones, the Respondent's president, stating their belief that the Respondent had "in effect" suspended them from union membership and that, therefore, they were no longer required to pay union dues. Jones responded by letter, dated May 22, in which he advised the four employees that the Respondent had not suspended them from membership and that they had an obligation to continue paying dues in order to remain members in good standing. On July 20, the four employees jointly sent Jones another letter inquiring about the penalties the Respondent would impose on them if they ceased paying dues. Jones subsequently replied on August 7 that the contract contained a union-security clause and that if the employees ceased paying union dues the

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[4] All subsequent dates are in 1989.

Respondent would inform the Employer and "you would no longer be allowed to work at the plant."

The judge rejected the General Counsel's contention that the Respondent had unlawfully disciplined the four alleged discriminatees. He found that the Respondent had the right to protect itself against the alleged discriminatees' activities which would have resulted in the erosion or the elimination of the bargaining unit that the Respondent represented. Therefore, the judge concluded that the General Counsel had not established a prima facie case that the discipline violated Section 8(b)(1)(A).

The judge found that the Respondent also did not violate the Act by threatening to invoke the union-security clause. Because the alleged discriminatees were attempting to change either half or all of the bargaining unit jobs into supervisory positions, the judge found that the Respondent had a legitimate union interest in preventing the erosion of its status as collective-bargaining representative. He stressed that the present case is distinguishable from *Steelworkers Local 4186 (McGraw Edison Co.)*, 181 NLRB 992 (1970), in that the Board there found that the union had unlawfully threatened to invoke the union-security clause against a member whose membership it had significantly impaired because of the employee's protected conduct in filing a decertification petition.

The judge also rejected the General Counsel's alternate contention that even if the activities for which the Respondent disciplined the alleged discriminatees were not protected, the Respondent had so significantly reduced their membership rights that it could not lawfully enforce the union-security clause against these employees. The General Counsel's argument, in the judges view, presented the Respondent with the "Hobson's choice" of either forgoing its right to discipline members under the proviso to Section 8(b)(1)(A) (thereby rendering the proviso to Section 8(b)(1)(A) a nullity) or relinquishing its right to enforce the provisions of a valid union-security clause (thereby ultimately self-destructing without the dues of disciplined members). The judge concluded that the General Counsel's position, if implemented,

would induce any members who are unwilling to pay dues in the first place for financial or philosophical reasons to subject themselves to union discipline "so they would be 'punished' by not having to pay union dues, although they would continue their employment." For these reasons, the judge dismissed the complaint.

Discussion

There are two actions involved herein: (1) the Union's internal discipline of certain employees, which discipline impaired their membership in the Union; and (2) the enforcement of a union-security clause against those employees, notwithstanding the fact that their membership was impaired.

These two matters are analytically distinct, although in a given case they may be related. If discipline is wholly internal, i.e., if it does not itself affect the employment relationship, the union may be able to impose the discipline even if it is aimed at a Section 7 right. For example, in *NLRB v. Allis-Chalmers, Mfg. Co.*, 388 U.S. 175 (1967), the Supreme Court held that a union could fine employee-members for exercising their Section 7 right to cross a picket line. In commenting on *Allis-Chalmers*, the Board has said:[5]

> The Supreme Court in *Allis-Chalmers* recognized that the right of collective bargaining is a paramount policy of national labor law, and that in order for a union to fulfill this obligation it must be able to promulgate its own rules and have the right to impose reasonable discipline on mem-**[220]**bers who do not obey such rules. The Court further found that integral to this policy is the union's right to protect itself against the erosion of its status of collective-bargaining representative by reasonably disciplining members for violating internal regulations. [Footnote omitted.]

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[5] *Meat Cutters Local 593 (S & M Grocers)*, 237 NLRB 1159, 1160 (1978).

To be sure, there are limitations on the union's right to impose discipline on members. One of these limitations is that the employee-members must be free to resign their membership and thereby escape the rule.[6] That is, employees have a right to resign from the union. If they resign prior to engaging in the Section 7 conduct deemed offensive by the union (e.g., crossing a picket line), the union cannot discipline them. If they have opted for continued membership, they cannot be heard to complain if the union enforces the rules of membership.

There is another important exception to the general rule concerning a union's right to impose internal discipline on members. If the union's rule impairs a policy that Congress has embedded in the labor laws, the union may not enforce the rule, even against a member. Of course, as we have seen, the mere fact that the discipline is in reprisal for a Section 7 right is not sufficient to condemn the discipline. See *Allis-Chalmers*. However, if the Section 7 right is the fundamental one of seeking access to the Board, the discipline in reprisal therefor may be unlawful.[7] Thus, for example, if the employee files a petition or a charge with the Board, the union cannot fine him for that action.[8]

In the instant case, the employees were all members of the Union at the time that they engaged in the conduct deemed offensive to the Union. They were free to resign from the Union but they chose not to do so. Although they were members, they engaged in conduct designed to oust or undermine the Union in its role as representative of the employees. Thus, as discussed above, the Union was free to impose discipline on them. The fact that the

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[6] *Scofield v. NLRB*, 394 U.S. 423, 430 (1969).

[7] The Sec. 7 right of seeking access to the Board is fundamental in the sense that all others are dependent on it. If the employee cannot come to the Board, he cannot vindicate any of his rights.

[8] See *NLRB v. Marine & Shipbuilding Workers*, 391 U.S. 418 (1968); *Molders Local 125 (Blackhawk Tanning Co.)*, 178 NLRB 208 (1969).

Union chose to discipline them by impairing their membership, rather than by expelling them or fining them, does not transform lawful discipline into unlawful discipline.

Based on the above, we agree with the judge that the discipline was lawful. The next issue is whether union security could be enforced against those whose membership has been lawfully impaired. Because the Respondent's discipline of these members did not violate the Act, the members continued, as unit employees, to be required under the union-security agreement to satisfy the sole obligation a union may enforce under a union-security provision: "the tendering of uniform initiation fees (if any) and dues."[9] In so finding, we stress that the Union, as the unit's exclusive bargaining representative, has a duty of fair representation toward all unit employees, and thus must continue to represent the disciplined employees without hostility, discrimination, or arbitrary conduct and with complete good faith and honesty.[10]

We therefore conclude that the Respondent did not violate Section 8(b)(1)(A) of the Act by threatening to invoke the union-security clause against Gilbert and the three other employee-members if they ceased paying dues after the Respondent disciplined them. Accordingly, we shall dismiss the instant complaint.

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[9] *Electrical Workers IUE Local 444 (Paramax Systems)*, 311 NLRB 1031, 1034 (1993). Member Devaney, who dissented in part on other grounds in *Paramax*, agrees with the *Paramax* majority's characterization of the union-security obligation and the duty of fair representation cited here.

No party has raised the issue of whether members whose membership rights have been impaired but who do not resign their membership may object to the expenditure of a portion of his/her dues on nonrepresentational activities. See *Communications Workers v. Beck*, 487 U.S. 735 (1988) (unions may not expend dues and fees collected under a union-security provision from objecting nonmembers on activities unrelated to their role as bargaining representative).

[10] Id. at 1033.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and the complaint is dismissed.

Gary M. Connaughton, for the General Counsel.
Michael Stapp, Esq. (Blake & Uhlig, P.A.), of Kansas City, Kansas, for the Respondent.

DECISION

STATEMENT OF THE CASE

MICHAEL D. STEVENSON, Administrative Law Judge. This case was tried before me at Oakland, California on February 20, 1990,[1] pursuant to an amended complaint issued by the Regional Director for the National Labor Relations Board for Region 32 on December 14, 1989, and which is based on a charge filed by James Gilbert (Gilbert or Charging Party) on October 6, 1989. The complaint alleges that International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers (Respondent) has engaged in certain violations of Section 8(b)(1)(A) of the National Labor Relations Act (the Act).[2]

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[1] All dates herein refer to 1988 unless otherwise indicated.

[2] Section 8(b)(1)(A) of the Act provides:

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to retrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided*, That this paragraph shall not impair the right of a labor organization to [221]prescribe its own rules with respect to the acquisition or retention of membership therein . . . .

Sec. 157 of the Act further provides that:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of

Issues

[221](1) Whether this case should be dismissed because Gilbert filed the unfair labor practice charge outside the applicable statute of limitations.

(2) Whether Respondent disciplined Gilbert and other alleged discriminatees because of their protected concerted activities.

(3) Whether Respondent unlawfully threatened to cause Kaiser to discharge the alleged discriminatees if they discontinued paying membership dues to Respondent.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and to cross-examine witnesses, to argue orally, and to file briefs. Briefs, which have been carefully considered, were filed on behalf of General Counsel and Respondent.

On the entire record of the case, and from my observation of the witnesses and their demeanor, I make the following

Findings of Fact

I. THE EMPLOYER'S BUSINESS

Respondent admits that the Employer is a California corporation which manufactures, sells, and distributes cement and related products and has an office and place of business located in Permanente, California. Respondent further admits that during the past year, in the course and conduct of its interstate business operations, the Employer sold and shipped goods or provided services valued

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collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

in excess of $50,000 directly to customers located outside the State of California. Accordingly, it admits, and I find that the Employer is engaged in commerce and in a business affecting commerce within the meaning of Section 2(2), (6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Respondent admits, and I find, that it is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

1. Background

Prior to April 1, 1984, Local 100 of the Cement, Lime, Gypsum and Allied Workers International Union (CL & G) represented certain employees at the Kaiser Cement Corporation. Other unions such as the Teamsters, Operating Engineers and the Laborers, represented other employees at the same plant. The collective-bargaining representative for all employees represented by unions at Kaiser is the AFL-CIO Building Trades Council.

On or about April 1, 1984, CL & G merged with Respondent; Local 100 became Local D-100 of Respondent. The president of the Local both before and after the merger (1977-1988), was Charging Party James Gilbert, a Kaiser employee since 1951. Prior to April 1984, Gilbert and others in Local 100 had opposed the merger, but thereafter, opponents took no action to express disagreement with the merger until 1986.

In August, 1986, Gilbert and other representatives of Local D-100 attended Respondent's convention. Based on events at the convention and the subsequent termination of long-time CL & G International representatives, Ken Weaver, Mike Philips, Jack Hammond and Ernie Lamaro, Gilbert began to actively oppose Respondent during meetings of the Local and in other ways.

None of the terminated International representatives testified in this case. However, it appears that Weaver in particular had been a close professional and personal acquaintance of Gilbert. Moreover, Weaver had been involved in litigation on behalf of Local 100 against Kaiser and against other union locals who represented Kaiser employees. The termination of Weaver was followed not long after by Respondent withdrawing funding for the lawsuit in progress. Not long after this, the lawsuit collapsed. Gilbert's anguished letter of September 16, 1986, to Respondent's President, Charles W. Jones (G.C.Ex. 14), asking that the discharge of Weaver be reconsidered was unsuccessful.

During early 1987, Gilbert met with certain company officials to discuss the possibility of changing all 37 or 38 bargaining unit employees represented by Local D-100 into nonunion salaried positions. These negotiations led nowhere, and it is not clear whether Respondent or other members of Local D-100 knew about Gilbert's activities. However, this was not the first time such a move had been discussed.

A short while before the merger, Kaiser had proposed removing four bargaining unit jobs out of the unit and making them nonunion. These jobs were the control room operators whose positions were to be again included within a later proposed letter of understanding, as explained below. In any event, Gilbert presented the company's premerger proposal to the membership for discussion and a vote, where it was soundly defeated. In presenting the proposal, Gilbert was acting within the scope of his position as president of Local 100 to present various proposals of Kaiser to clarify what in some cases was a "grey area" not specifically covered by the collective-bargaining agreement (G.C.Exh. 17).

In July, Gilbert prepared and circulated a petition among members of his local. The petition reads:

> As members of Lodge D-100, employed at the Kaiser Permanente Cement Plant, we do not want the Boilermakers International Union to represent us and request an election by the

NLRB to chose a new International Union to affiliate with. [G.C.Exh. 15]

Ultimately 37 out of 38 members signed this petition. Signers included a Respondent witness named James Ellsworth, who was elected president of the Local after Respondent disciplined and removed Gilbert as president for certain conduct not yet reported in these facts. Ellsworth explained his signa-[222]ture on the petition by testifying that Gilbert had misled signers to believe that Respondent had not been doing enough for the local. This notion was based in part on the alleged failure of Weaver's replacement, John Holaday, to make a timely appearance in the plant. In his testimony, Respondent witness Holaday blamed his tardy appearance on Gilbert.

As he circulated this petition, Gilbert took no official position on the issue, but he conceded in his testimony that he had stated his position in favor of the petition to all members solicited to sign. Indeed, Gilbert signed his name on the first line of the petition. For reasons that do not appear of record, Gilbert did not submit this petition to Respondent.

The disaffiliation petition was followed in December by another petition first referred to in the record as a decertification petition, and later clarified on cross-examination of Gilbert to be a certification petition for a labor organization called the Independent Workers of North America (IWNA).[3] An official of this organization is Kent Weaver, former international representative of the CL & G fired by Respondent.

Weaver sent Gilbert a number of union authorization cards for Gilbert to distribute to members of Local D-100 and to solicit members' signatures. Gilbert returned a number of signed cards to

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[3] According to Gilbert, the IWNA is the old Cement, Lime & Gypsum Locals that had disaffiliated from Respondent and formed a new International Union (Tr. 48).

Weaver. Ultimately, Gilbert withdrew the petition because he felt the multiunit bargaining unit at Kaiser made success unlikely.

Notwithstanding Gilbert's withdrawal of both petitions referred to above, sometime after he had been removed from his position as president of Local D-100, he convened a "rump" session of some members of the local. About 20 members voted for and about 7 against an affiliation with IWNA. There was no official recognition of these results.

2. The letter of understanding

As recited above, Gilbert and the other alleged discriminatees were disciplined for certain conduct. However, the parties to this case do not agree on what conduct was punished. For now, it suffices to say that the ostensible reason for the discipline involved the role of the alleged discriminatees in presenting the employer's proposed letter of understanding to the membership of Local D-100 for discussion and a vote.

On or about September 9, Gilbert presented this letter to the membership in a meeting long enough to accommodate both the day and evening shifts. No advance notice of the details of the letter was provided. In addition, Gilbert refused to provide copies of the letter to the membership. Instead, he purported to read the letter to the members and then led discussion on it. A faction of the membership, loyal to the Respondent, requested copies of the letter and a postponement of the vote for a few days while members discussed it and perhaps sought additional information. Gilbert denied all such requests and insisted on a vote then and there. Those members who were employed on the evening shift had to vote and leave without hearing the remarks of the majority of the members who were employed on the day shift and came to the meeting later.

The letter of understanding reads as follows (G.C. Exh. 16):

9/22/88

DRAFT

LETTER OF UNDERSTANDING

We have been engaged in discussions over the past several weeks concerning the evolution of and the need for changing the job responsibilities, functions, and authority of several classifications heretofore within the jurisdiction of the Cement, Lime, Gypsum and Allied Workers, Division of Boilermakers, International Local Lodge D-100 (CL&G). Specifically, we have discussed and reached agreement regarding the following classifications: Quality Control Analyst, Quality Control A, Quality Control B, Finish Miller, and Process Operator.

During our discussion, we have agreed that the changes have occurred and are necessary because of the changed nature of our business, increased competition based on quality, direct increased contact with customers, working conditions, and a need for more close direction of the manufacturing processes and the workforce. Within the Quality Control process at the plant, these changes mean that the people enjoy a greater community interest, and their functions are more aligned with the management of the operation. For many, if not all the same reasons, we have agreed that the Finish Miller and Process Operator classifications should be made supervisory. Therefore, the Company has restrucured (sic) our organizational chart and is prepared to assign the new job responsibilities, functions, and authority upon execution of this Agreement. It is understood and agreed that the effect of this agreement will be to remove those classifications listed above and all related work from the bargaining unit. Hereafter, the individuals selected for the Management/Supervisor positions created pursuant to this LOU, will be salaried or salaried (end of sentence missing from exhibit).

It is also agreed that when permanent vacancies occur in the management positions dealt with in this LOU, members of the CL&G will be given first consideration for promotion to such positions. Likewise, it is agreed that management may temporarily upgrade members of the CL&G to the management positions dealt with herein for purposes of training and/or coverage.

Any action by any federal agency, court, or arbitrator which materially affects this LOU as to the salaried status of the affected employees will render the Company's obligation to provide them with salaried compensation and benefits null and void, as if their status had never changed.

Agreed this _____ day of _____, 1988.

For Kaiser Cement Corporation For CL&G, D-100

All agree that the primary effect of this letter if it had been agreed to by the membership would have been to remove from the bargaining unit 17 jobs out of the 37 or 38 represented by Local D-100 (Total number of bargaining unit positions represented by all unions at Kaiser is 170-180). The 17 jobs would then have become salaried, supervisory positions under the complete control of Kaiser management.

[223]According to Gilbert, company officials drafted the letter. However, Gilbert testified the letter was drafted as a result of his initiating contact with Joe Hobby, the Employer's Industrial Relations Supervisor, with whom Gilbert had held prior discussions about taking all 37-38 bargaining unit positions into nonunit status. Gilbert held 2-3 meetings with Hobby, who did not testify, regarding the content of the 1988 letter of understanding. Because the company offered to take only about half of the bargaining unit jobs into salaried positions, Gilbert allegedly did not favor the end product. Nevertheless, Gilbert agreed to present it to the membership.

Gilbert's job was one of those included in the 17 jobs to be removed from the unit. In presenting the letter on September 9, Gilbert repeated what had been represented to him by Hobby, that pensions for supervisors were much more generous—about double—than those provided to bargaining unit employees. As for those members who might be reluctant to approve the letter, because unlike Gilbert, their jobs were not slated to be converted to management, Gilbert emphasised to them the commitment contained within the letter of understanding: that where later vacancies occurred in the 17 new management positions, bargaining unit employees would be considered on a preferential basis.

When all the votes were counted, the letter of understanding was defeated by a vote of 23 to 11.

The second alleged discriminatee is Donald Hall, a witness for General Counsel. A Kaiser employee for 38 years and financial secretary of Local D-100 between 1969-1988, Hall, like Gilbert, resented the termination of Weaver and other International representatives by Respondent. Hall signed the petition (G.C. Exh. 15) circulated by Gilbert in July to measure the sentiment for disaffiliating from Respondent.

On September 22, Hall attended the union meeting to discuss the letter of understanding presented by Gilbert. Hall testified he followed the lead of Gilbert at the meeting and took no public position on the letter.

The third alleged discriminatee is Joseph Gaxiola, also a witness for General Counsel.[4] Employed by Kaiser for 20 years and

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[4] That portion of the transcript purporting to contain the testimony of Gaxiola is close to incomprehensible. The fault is not that of the court reporter. Because of language difficulties and/or a speech impediment, Gaxiola was barely an intelligible witness. He was warned repeatedly by the court reporter of the technical problems created by his manner of testifying (e.g., Tr. 135). Little or no improvement resulted from these admonitions. Apparently, the witness did the best he could and so have I in trying to ascertain what he said.

elected a trustee of Local D-100 for 4 years through 1988, Gaxiola attended the September 22 union meeting and participated in discussions. Because Gaxiola had to leave the meeting early to work the evening shift, he prepared a written vote on the letter of understanding which he then showed to one or more other members who had not yet voted. Gaxiola voted "No" on the letter of understanding.

About two weeks later, Gaxiola prepared a petition which he circulated to the local's members. The introductory paragraph reads as follows (G.C. Exh. 22):

> This petition is to determine the support of the members of Local D-100 on a Letter of Understanding that makes all classifications in D-100 salaried or salaried non-exempt.

This time Gaxiola signed in favor of the proposition,[5] but most other signers opposed the proposition. In preparing the petition, Gaxiola testified he acted on his own, and not as trustee of the local. Although he had been a secretary-treasurer of the Local for 13 years, Rose had not held that position or any position in the local for 10-12 years prior to 1988.

The final alleged discriminatee is Arthur Rose, a Kaiser employee for 39 years. Unlike the other alleged discriminatees, Rose had not been a current officer of Local D-100 during the times material to this case.

Rose attended the September 22 meeting and took a public vocal position in favor of the letter read by Gilbert. Rose argued that the jobs would be a good deal for the 17 incumbents. Because those remaining in bargaining unit positions were much younger than the incumbents, Rose continued, they would eventually succeed

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[5] Instead of affecting only 17 positions, Gaxiola's petition affected all Local D-100 positions. The purported linkage to a letter of understanding cannot be explained.

to the jobs, as the Company usually hires up through the ranks. Rose's belief that Kaiser would look first to bargaining unit employees to fill vacancies in the 17 exempt positions was based in part on a conversation he had with Hobby a few days before September 22, wherein Hobby assured Rose and repeated what was in the letter itself, that where possible, any openings down the line would be filled from Local D-100 members.

3. Respondent discipline of alleged discriminatees

On or about October 16, James Ellsworth, a Kaiser employee for 17 years, and current president of Local D-100 filed charges against the four alleged discriminatees. More specifically, Ellsworth charged as follows: that Gilbert "bargained with company in order to disband the union and have the jobs into the salaried position." (G.C. Exh. 2); that Hall, "aided J. Gilbert and A. Rose in trying to get union members to vote into being salaried and breaking up union. Also did not notify members or International about J. Gilbert's illegal activities (G.C. Exh. 3); that Rose, abetted Jim Gilbert in trying to get the union members to vote to go salary and disband the Union. Didn't notify Union members or International about the illegal activities Jim was involved in." (G.C. Exh. 4); that Gaxiola "circulated a petition asking union members if they wanted members to go to salaried positions." (G.C. Exh. 5).

On or about November 1, the four alleged discriminatees were notified of a hearing to be held on November 19 to adjudicate the charges filed by Ellsworth (R. Exhs. 1-4).

At the November 19 disciplinary hearing, International Representative Holaday acted as prosecutor and presented the evidence against the four alleged discriminatees. G. Ross Seaman, another International representative, acted as hearing officer and prepared a written report to the Respondent's International Executive Council which rules on intra-union charges. Called as a witness by Respondent in the instant case, Seaman testified that the four alleged discriminatees were charged only with activities in support

of removing a number of persons from the bargaining unit. Seaman's report reads as follows:

[224]BEFORE THE INTERNATIONAL BROTHERHOOD OF BOILERMAKERS IRON SHIPBUILDERS, BLACKSMITHS, FORGERS & HELPERS, AFL-CIO

INTERNATIONAL EXECUTIVE COUNCIL

In the matter of:

Charges filed against James Gilbert, Arthur Rose, Donald Hall and Joseph Gaxiola of Local Lodge D-100 by James H. Ellsworth for alleged violations of Article XVII, Section 1(a), (e), (f), (h), (k), and (l) of the International Brotherhood Constitution.

Hearing Date: November 19, 1988, Los Gatos, California
Before: G. Ross Seaman, International Executive Council Hearing Officer

BACKGROUND

The issues in this case as contended by the charging party are that Mr. Gilbert bargained with the company for the purpose of removing certain classifications and jobs from the bargaining unit. He contends further that Mr. Rose and Mr. Hall aided and abetted Mr. Gilbert to this end by attempting to convince the membership to support a memorandum of agreement that was prepared by the company for that purpose. He also contends that Mr. Gaxiola prepared and circulated a petition that was intended to give added support to the memorandum of agreement.

INFORMAL HEARING

An informal hearing was held on November 19, 1988 commencing at approximately 8:30 A.M. The charging party

offered to withdraw the charges against all of the charged parties in exchange for their resignation from office and the calling of an election to be held in December of 1988. This offer was declined by all of the charged parties. The charging party made a further offer of an unconditional withdrawal of the charges against Mr. Hall and Mr. Gaxiola as he felt theirs was a relatively minor role in the entire matter. This offer was rejected on the grounds that they felt they were innocent of any wrong and wanted to clear their names by way of a formal hearing.

FORMAL HEARING

A formal hearing was convened at approximately 1:30 P.M. on November 19, 1988. The charged parties objected to the holding of a formal hearing on this date on the grounds that they interpret Article XVII Section 2(b) to mean that they have an additional 15 days from the end of the informal hearing to prepare for a formal hearing. Mr. Gilbert asked if Kent Weaver would be allowed to represent the charged parties and was promptly denied his request. The hearing proceeded and was concluded at approximately 6:07 P.M.

FOOT NOTE

The charging party, Mr. Ellsworth indicated Mr. Hall and Mr. Gaxiola had been minor participants in this matter. In my observations of both hearings, I tend to agree with Mr. Ellsworth. [R. Exh. 6.]

On or about December 19, Respondent notified the alleged discriminatees of the dispositions of their cases:

(1) Gilbert found guilty of all charges; Punishment: suspension from office and ineligible to hold any elected or appointed office in Respondent for five years; Also for five years—prohibited from attending all Union meetings or

functions; except a meeting at which a contract directly affecting him is to be voted upon [G.C. Exh. 6].

(2) Hall found guilty of all charges; Punishment: same as Gilbert except duration is three years rather than five [G.C. Ex. 7].

(3) Rose found guilty of three out of four charges; Punishment same as Gilbert except duration is two years [G.C. Ex. 8].

(4) Gaxiola found guilty of all charges; Punishment: same as Rose [G.C. Exh. 9].

All four letters above also informed Gilbert, Hall, Rose, and Gaxiola that Holaday would supervise the day-to-day administration of Local D-100 and election of Local Lodge officers.

In his testimony as a Respondent witness, Ellsworth described the 17 jobs which were the subject of the letter of understanding as quality control and computer operator type jobs. These positions, according to Ellsworth, were critical to operation of the plant in the event of a strike. Because management would control these jobs, lower skilled persons could be recruited to cross picket lines and keep the plant operating during a strike, thereby lessening the bargaining power of the Union.

4. Postdiscipline events

On or about April 24, 1989, Gilbert and the other alleged discriminatees sent the following letter to C.W. Jones, president of Respondent (G.C. Exh. 10):

Mr. C.W. Jones
International President
International Brotherhood of Boilermakers
753 State Avenue, Suite 570
Kansas City, Kansas 66101

Dear Sir:

In December of 1988 we, the undersigned, were suspended from holding offices and attending union meeting of the Boilermakers International.

We have been advised that we have been "in effect suspended" from the Union and are not required to pay union dues.

We have been keeping our dues current until we could contact you and get your confirmation. If you are in agreement, please advise us and also arrange for the union to refund our union dues retroactive to December 1988.

We are awaiting your reply. Thank you.

[225]Sincerely,

/s/ James Gilbert	/s/ Don Hall
James Gilbert	Don Hall
/s/ Arthur Rose	/s/ Joe Gaxiola
Art Rose	Joe Gaxiola

About 1 month later, Jones wrote back (G.C. Exh. 11):

May 22, 1989

D100-88-1
D100-88-2
D100-88-3
D100-88-4

Mr. James Gilbert
Mr. Arthur Rose
Mr. Donald Hall
Mr. Joseph Gaxiola
c/o 1595 Laurelwood Rd., #28
Santa Clara, CA 95054

Dear Gentlemen and Brothers:

This will acknowledge receipt of your letter wherein you request clarification of whether or not you are required to continue to pay union dues as a result of penalties imposed under Article XVII.

Please be advised, although penalties were imposed subsequent to Article XVII Hearings, you were not suspended from membership. You are still required to pay monthly dues if you want to remain members in good standing of the International Brotherhood of Boilermakers.

Trusting you will be guided accordingly and, with best wishes, I am

Fraternally yours,

/s/ Charles W. Jones
Charles W. Jones
International President

On July 20, 1989 (misdated as 1988) Gilbert, Rose, Hall, and Gaxiola sent a second letter to Jones (G.C. Exh.12):

Mr. Charles W. Jones
International President
Boilermakers Union
New Brotherhood Building
Kansas City, Kansas 66404

Dear Mr. Jones:

This letter is in response to your letter to us dated May 22, 1989.

Please explain what penalties might be imposed if we discontinued paying union dues to Local D-100.

We would appreciate your response.

Sincerely,

/s/ Jim Gilbert	/s/ Don Hall
Jim Gilbert	Don Hall
/s/ Art Rose	/s/ Joe Gaxiola
Art Rose	Joe Gaxiola

Jones responded on August 7, 1989 (G.C. Exh. 13):

D100-88-1
D100-88-2
D100-88-3
D100-88-4

Mr. James Gilbert
Mr. Arthur Rose
Mr. Donald Hall
Mr. Joseph Gaxiola
c/o 1595 Laurelwood Road #28
Santa Clara, CA 95054

Dear Gentlemen and Brothers:

This is in response to your letter dated July 20, 1989.

The existing contract between the Company and Local Lodge D100 contains a union security clause. Should you discontinue paying union dues, the Union would have no choice but to notify the Company and you would no longer be allowed to work at the plant.

Trusting you will continue to maintain your membership in Local Lodge D100, and with best wishes, I remain

Fraternally yours,
/s/ Charles W. Jones
Charles W. Jones
International President

Monthly dues for all four members amounted to $32.50 per month. Only Gilbert actually stopped paying dues. He first testified that he fell behind in the payment of his dues (Tr. 42); later, Gilbert testified that he took the position that he didn't have to pay dues on the grounds he had been suspended from the Union. So he didn't pay for about 2 months (Tr. 43). Then on about September 30, 1989, John Morrison, a member of Local D-100 associated with Ellsworth, wrote a letter to Pete Horton, the industrial relations

supervisor at the plant. In this letter, Morrison asked that article 2, section B of the contract be enforced against Gilbert (G.C. Exh. 20). That is, Morrison was asking that Gilbert be dismissed for nonpayment of dues. Instead of dismissing Gilbert, Horton called him into his office and showed him Morrison's letter. Gilbert promised to and did in fact pay all union dues then in arrears and his job security was not affected.

B. *Analysis and Conclusions*

1. The statute of limitations issue

In its Answer to amended complaint and notice of hearing, Respondent raised an affirmative defense, contending "the Amended Complaint should be dismissed, because the unfair labor practice charge was filed outside the applicable statute of limitations provided for in 29 U.S.C. Sec. 160(b)" (G.C. Exh. 1(h)). Respondent reiterated its position in its opening statement at hearing (Tr. 17). Because this issue was raised in an appropriate manner, it is puzzling to say the least—and annoying—that neither side had seen fit to address the statute of limitations in its brief.

In *Nickles Bakery of Indiana*, 296 NLRB 927 (1989), the Board had occasion to review basic law regarding Section 10(b) of the Act:

> In considering the general sufficiency of a charge to support an allegation in the complaint, the Board has **[226]**generally required that the complaint allegation be related to and arise out of the same situation as the conduct alleged to be unlawful in the underlying charge, although it need not be limited to the specific violations alleged in the charge.[3] This requirement is derived from Section 10(b) of the Act, which provides in pertinent part as follows:

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[3]*Stainless Steel Products*, 157 NLRB 232, 234 (1966); *El Cortez Hotel*, 160 NLRB 1442, 1446-1447 (1966), affd. 390 F.2d 127 (9th Cir.1968).

> Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have the power to issue and cause to be served upon such person a complaint *stating the charges in that respect*.... [Emphasis added.]

The Supreme Court in *NLRB v. Fant Milling Co.*, 360 U.S. 301, 309 (1959), in discussing the Board's authority to discharge its duty of protecting public rights, held that a complaint alleging violations not specifically alleged in the charge is proper if the matters asserted in the complaint "are related to those alleged in the charge and ... grow out of them while the proceeding is pending before the Board." Consistent with *Fant Milling*, the Board has long required a sufficient factual relationship between the specific allegations in the charge and the complaint allegations.[4]

. . . .

In *Redd-I, Inc.*, 290 NLRB 1115 (1988), the Board held that in deciding whether complaint amendments are closely related to charge allegations, it would apply the closely related test, comprised of the following factors. First, the Board will look at whether the otherwise untimely allegations involve the same legal theory as the allegations in the pending timely charge.[5] Second, the Board will look at whether the otherwise

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[4]See *Red Food Store*, 252 NLRB 116 (1980), and cases cited therein.

[5]In determining whether essentially similar legal theories underlie different allegations, we noted in *Redd-I* that usually the same section of the Act will be the basis for both the timely and untimely allegations. Id. at 1118. However, it is not necessary that the same actions of the Act be invoked. Thus, we note that in Whitewood Oriental Maintenance Co., 292 NLRB 1159, 1169 (1989), the Board found that even though the otherwise untimely amendment invoked Sec. 8(a)(2) of the Act and the timely charge referred to Sec. 8(a)(5), the allegations satisfied this relatedness requirement because they were predicated on essentially the same legal theory. See also *Proctor & Gamble Mfg. Co. v. NLRB*, 658 F.2d 968, 984-985 (4th Cir.1981), cert. denied 459 U.S. 879 (1982) (8(a)(3) allegation found closely related under *Fant Milling*, supra, to 8(a)(5) allegations).

untimely allegations arise from the same factual circumstances or sequence of events as the pending timely charge. Finally, the Board may look at whether a respondent would raise similar defenses to both allegations. Id. at 1118[6] Although the facts of *Redd-I* involved a complaint amendment, the precedent relied on in *Redd-I* applies a similar closely related requirement to both initial complaints and amended complaints. See particularly *NLRB v. Dinion Coil Co.*, 201 F.2d 484, 491 (2d Cir.1952), discussed in *Redd-I*, supra, at 1116.

The charge in this case was filed on October 6, 1989, and alleged that Respondent violated the Act by threatening to have Kaiser discharge the alleged discriminatees if they stopped paying union dues, "despite the Union's failure to offer said employees membership under the same terms as other employees" (G.C. Exh. 1(a)). Based on this charge, the complaint alleges that Respondent's threat to enforce the union-security clause, was unlawful.

It is also alleged in the complaint that on December 17, the alleged discriminatees were disciplined for engaging in protected concerted activities. The first allegation is within and the second allegation is outside the 6-month statute of limitations. The issue then is whether the untimely allegations of the complaint are closely related to the timely allegation contained in the charge. To answer this question, I turn to those factors from *Redd-I, Inc.*, supra and apply them to the present case.

(a) *Does the untimely allegation involve the same legal theory as the allegations in the timely charge?*

To answer this question, I need look no further than General Counsel's brief, p. 17. There, General Counsel makes clear that as

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[6]In doing so, however, the Board will not rely on a respondent's mere claims of different unlawful reasons for taking different action alleged in the complaint as unlawful, but will look to whether the timely and otherwise untimely allegations allege the same unlawful object. See *Davis Electrical Constructors*, 291 NLRB 115, 116 fn. 9 (1988).

a result of the timely charge, he raises a "broader theory, [whether] a union security clause can be enforced against an employee, whose membership rights are substantially reduced, for whatever reason, protected or otherwise." General Counsel's theory for the untimely allegation is that the alleged discriminatees were disciplined for engaging in protected concerted activities. I find sufficient connection between the two theories as to satisfy the first legal test.

(b) *Does the untimely allegation in the complaint arise from the same sequence of events as the pending timely charge?*

As shown by the facts, this question must be answered in the affirmative, and further discussion is not warranted.

(c) *Will Respondent raise similar defenses to both allegations?*

Again, I find the answer to be in the affirmative. Respondent's basic theory of its defense is that at all times material to its defense, Respondent was acting within the scope of its legal authority. I will address that contention below on the merits. For now, I find that this case should not be dismissed in whole or in part on statute of limitations grounds. See *Kelly-Godwin Hardwood Co.*, 269 NLRB 33, 36-37 (1984).

2. Did Respondent discipline the alleged discriminatees for protected concerted activities?

I begin with the relevant provisions of Respondent's constitution which were alleged to have been violated. As noted above, Gilbert was found guilty of violating art. xvii, secs. 1(c), (e), (f), (k) and (l) which read as follows (R. Exh. 5):

> Section 1. The basis of charges against officers or members of a subordinate body, against officers of the [227]International Brotherhood or against a subordinate body itself shall include,

but shall not be limited to, any one or more of the following offenses:

(a) violation of any provision of this Constitution or the By-Laws of a subordinate body or failure to perform duties or functions specified therein;

(e) engaging in any activity or course of conduct contrary or detrimental to the welfare or best interest of the International Brotherhood or of a subordinate body;

(f) the commission of any unlawful, dishonest, dishonorable or discreditable act in connection with union duties or responsibilities;

(k) engaging in or fomenting any acts or course of conduct which are inconsistent with the duties, obligations and fealty of the members of a trade union and which violate sound trade union principles or which constitute a breach of any existing collective bargaining agreement;

(l) failure to exercise responsibility toward the International Brotherhood as an institution or engaging in conduct which would interfere with the International Brotherhood's performance of its obligations. . . .

Hall and Rose were found guilty of violating sections l(e), (k) and (l) and Gaxiola was found guilty of violating Secs. l(e) and (k) of the same article.

A union constitution has beer [*sic*] described as a "fundamental agreement of association." *Plumbers v. Plumbers Local 334*, 452 U.S. 615, 619 (1981). Both the Board (*Telephone Traffic Union*, 287 NLRB 998, 1002 (1986)) and the courts (*Nelson v. Iron Workers*, 131 LRRM 2025, 2029 and cases cited therein (D.C.D.C. 1988); *Stage Employees IATSE Local 776 v. Stage Employees IATSE Local 695*, 123 LRRM 2784, 2785 (9th (9th Cir. 1986)) have held

that a union's interpretation of its constitution is entitled to considerable deferance.

With these preliminary principles of law in mind, I turn to the record. There General Counsel contends that Gilbert was disciplined, at least in part, for certain activities different from those actually charged: for example, circulating a petition opposing Respondent's representation and supporting IWNA, a rival union. These activities are protected under the Act. Cf. *Service Employees Local I-J (I. Shor Co.)*, 273 NLRB 929 (1984). However, I agree with Respondent (Br. pp. 10-12) that General Counsel has failed to prove a nexus between Gilbert's prior activities and the discipline at issue. *Sheet Metal Workers Local 22 (Miller Sheet Metal)*, 296 NLRB 1146, 1147 (1989). Accordingly, the issue is whether Gilbert, Hall and Rose were properly disciplined for presenting the letter of understanding on September 22, and whether Gaxiola was properly disciplined for preparing and circulating a subsequent petition to remove all the members of D-100 from the bargaining unit and place them in salaried positions.

In *Sheet Metal Workers Local 22*, supra at 1147-1148, the Board stated:

> The Board and courts have long recognized that Congress in enacting Section 8(b)(1) did not intend to regulate the internal affairs of unions, and that the proviso to that section preserves the rights of unions to impose fines as well as well as to expel members.[7] As the Board has stated:[8]
>
> The Supreme Court in *Allis-Chalmers* recognized that the right of collective bargaining is a paramount policy of national labor law and that, in order for a union to fulfill

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[7] *NLRB v. Allis-Chalmer Mfg. Co.*, 388 U.S. 175, 191-192 (1967).

[8] *Meat Cutters Local 593 (S & M Grocers)*, 237 NLRB 1159, 1160 (1978).

> this obligation, it must be able to promulgate its own rules and have the right to impose reasonable discipline on members who do not obey such rules. The Court further found that integral to this policy is the union's right to protect itself against the erosion of its status of collective-bargaining representative by reasonably disciplining members for violating internal regulations. [Footnote omitted.]

The Supreme Court, in the seminal case of *Scofield v. NLRB*, observed:[9]

> . . . Sec. 8(b)(1) leaves a union free to enforce a properly adopted rule which reflects a legitimate union interest, impairs no policy Congress has imbedded in the labor laws, and is reasonably enforced against union members who are free to leave the union and escape the rule.

In all those cases where the Board has found union discipline to have violated Section 8(b)(1)(A) of the Act, the discipline has impeded union member access to the Board's processes. See, for example, *Sheet Metal Workers Local 22*, supra. However, the union discipline in the present case has nothing at all to do with restricting access to the Board's processes. Rather it has to do with Respondent's right to protect itself against the erosion of its status as collective-bargaining representative.

I note the Board's decision in *Buffalo Newspaper Guild Local 26 (Buffalo Courier Express)*, 265 NLRB 382 (1982). In that case, the union disciplined its member for filing a unit clarification issue with the Board. The intended result would have been a Board determination that certain individuals be excluded from the bargaining unit due to their supervisory status (at 383). While the Board admitted that such an action was against a union's interest, the

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[9]*Scofield v. NLRB*, 394 U.S. 423, 430 (1969).

member was immune from internal union discipline, because of an overriding public policy in permitting access to the Board's processes. The Board found that the union violated Section 8(b)(1)-(A) by disciplining its member.

In the instant case, by comparison, the result of Gilbert, Rose, and Hall's activities would have been to remove about half of the bargaining unit positions into salaried and supervisory positions. The result of Gaxiola's activities would have been to remove all the bargaining unit positions into salaried positions. It is difficult to imagine any greater erosion of Respondent's collective-bargaining status than what may have been caused by the alleged discriminatees.[6]

The case of *Meat Cutters (S & M Grocers)*, 237 NLRB 1159 (1978) supports Respondent's theory. In that case, the [228]Board dismissed a case alleging that Section 8(b)(1)(A) of the Act had been violated. The issue presented involved reconciling a union's right to solidarity during an organizing drive with the public policy of employees being free of coercion or restraint in choosing their collective-bargaining representative. (Union had threatened to discipline members who did not support or participate in or who actively opposed the organizing drive at the Employer's store). In dismissing the case, the Board held that the Union's threat of a fine was aimed not at deterring members from invoking the Board's procedures, but at requiring its members to support the organizational efforts.

In sum, I find that General Counsel has failed to prove a prima facie case that Respondent violated Section 8(b)(1)(A) of the Act. Compare *NLRB v. Iron Workers (Walker Construction Co.)*, 130 LRRM 2585 (5th Cir.1983). Instead, I find that in enforcing the various provisions of its constitution quoted above, Respondent was

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[6] In focusing purely on the numbers at this point, I have not forgotten the testimony of Ellsworth that some or all of the 17 positions were especially critical to Respondent's bargaining power. I credit Ellsworth's testimony and find it supports Respondent's theory.

vindicating a legitimate union interest—to prevent erosion of its status as collective-bargaining representative. In addition, I find that the provisions were reasonably enforced against union members who are free to leave the union and escape the rule.[7]

Because I have found that the alleged discriminatees were not disciplined for the exercise of any rights protected by Section 7 of the Act, the invoking of a lawful union-security clause is not unlawful. Accordingly, the cases cited by General Counsel at p. 8 of his brief, e.g., *Steelworkers Local 4186 (McGraw Edison Co.)*, 181 NLRB 992 (1970), do not apply to the instant case. In any event, it was the alleged discriminatees who first raised the issue regarding enforcement of the union-security clause. I can find no reason why, under the facts and circumstances of this case, Respondent's written answer violated the Act.

In this case only Gilbert failed to pay his union dues for 2 months. It is unclear whether he was unable or unwilling to pay these dues. Pursuant to a valid union-security agreement, a union may cause an employr [*sic*] to discharge an employee who by nonpayment of dues fails to maintain union membership. 29 U.S.C. §158(a)(1) (1976). *Sheet Metal Workers' Local 355 v. NLRB*, 716 F.2d 1249, 1254 (9th Cir. 1983). Before a union may do this, however, certain procedural formalities must be observed. In this case, as soon as Gilbert was counseled about his obligations, under the lawful union-security clause, he paid his back dues, and so far as the record shows is now current.[8]

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[7] That the alleged discriminatees may be members of Respondent pursuant to a union-security clause does not affect their ability to resign, albeit they will still be required to meet their financial obligations thereunder. *Meat Cutters*, supra, 237 NLRB 1159, 1161, fn. 7.

[8] I find that Respondent met its fiduciary obligations to deal fairly with its members. Respondent gave the alleged discriminatees reasonable notice of their dues-related obligations and an opportunity to make good any delinquency. *Teamsters Local 122*, 203 NLRB 1041 (1973), enfd. without opinion, 502 F.2d 1160 (1st Cir. 1974). And Respondent properly specified that discharge would result from a failure to pay. *Western Publishing Co.*, 263 NLRB 1110 (1982).

As an alternative argument, General Counsel contends (Br. p. 17) that even if the activities of the alleged discriminatees for which they were disciplined were not protected, their membership rights have been so substantially reduced that enforcement of the union-security clause against them becomes unlawful. Not surprisingly, General Counsel finds no cases to support this contention.

The basic flaw in General Counsel's argument is that it presents Respondent or any labor organization with a Hobson's choice: either forgo its right to lawfully discipline its members, thereby rendering the proviso to Section 8(b)(1)(A) a nullity, or relinquish its right to enforce a lawful union-security clause, thereby ultimately self-destructing without the dues of disciplined members. Moreover, General Counsel's positions, if implemented, would induce members who for financial or philosophical reasons, are unwilling to pay dues in the first place, to subject themselves to union discipline, so they would be "punished," by not having to pay union dues, although they would continue their employment. General Counsel's arguments fall of its own weight and further discussion is unwarranted.

For the reasons stated above, I will recommend to the Board that this case be dismissed.

Conclusions of Law

1. The Employer, Kaiser Cement Corporation, is an employer within the meaning of Section 2(2) of the Act, engaged in commerce and in an industry affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Respondent, International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has not engaged in the unfair labor practices alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[9]

ORDER

It is recommended that the complaint be dismissed in its entirety.

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[9] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

APPENDIX C

ORDERS OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT DENYING REHEARING AND REHEARING *IN BANC*

August 16, 1995

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 94-1081 **September Term, 1994**

James Gilbert,

Petitioner,

v.

National Labor Relations Board,

Respondent

FILED: United States Court of Appeals For the District of Columbia Circuit
August 16, 1995

BEFORE: Edwards, Chief Judge; Williams and Rogers, Circuit Judges

ORDER

Upon consideration of petitioner's petition for rehearing filed July 28, 1995, it is

ORDERED, by the Court, that the petition be denied.

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Robert A. Bonner
Deputy Clerk

United States Court of Appeals
For The District of Columbia Circuit

No. 94-1081 **September Term, 1994**

James Gilbert,

Petitioner,

v.

National Labor Relations Board,

Respondent

FILED: United States Court of Appeals For the District of Columbia Circuit
August 16, 1995

BEFORE: Edwards, Chief Judge, Wald, Silberman, Buckley, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, and Tatel, Circuit Judges

ORDER

Upon consideration of Petitioner's Suggestion for Rehearing In Banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the suggestion be denied.

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Robert A. Bonner
Deputy Clerk

APPENDIX D

TEXT OF

STATUTORY PROVISIONS INVOLVED

NATIONAL LABOR RELATIONS ACT, §§ 7, 8(a)(3), and 8(b)(1)(A) 29 U.S.C. §§ 157, 158(a)(3), and 158(b)(1)(A)

§157. Right of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

§158. Unfair labor practices

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer—

* * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless

following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided* further, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * *

(b) Unfair labor practices by labor organization

It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein * * * .

APPENDIX E

AMENDED COMPLAINT

December 14, 1989

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32

INTERNATIONAL BROTHERHOOD OF
BOILERMAKERS, IRON SHIPBUILDERS,
BLACKSMITHS, FORGERS AND HELPERS
(Kaiser Cement Corporation)

and Case 32-CB-3316

JAMES GILBERT, An Individual

AMENDED COMPLAINT AND NOTICE OF HEARING

It having been charged by James Gilbert, an individual, that International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, herein called Respondent, has engaged in, and is engaging in, certain unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, as amended, 29 U.S.C., Sec. 151, et seq., herein called the Act, the General Counsel of the National Labor Relations Board, herein called the Board, on behalf of the Board, by the undersigned, pursuant to Section 10(b) of the Act and Sections 102.15 and 102.17 of the Board's Rules and Regulations, Series 8, as amended, hereby issues this Amended Complaint and Notice of Hearing and alleges as follows:

1.

The charge was filed by James Gilbert on October 6, 1989, and a copy thereof was served on Respondent by certified mail on or about that same date.

2.

(a) At all times material herein, Kaiser Cement Corporation, herein called Kaiser, a California corporation with an office and place of business in Permanente, California, has been engaged in the

manufacture, sale and non-retail distribution of cement and related products.

(b) During the past twelve months, Kaiser, in the course and conduct of its interstate business operations, sold and shipped goods or provided services valued in excess of $50,000 directly to customers located outside the State of California.

3.

Kaiser is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

4.

Respondent is now, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

5.

At all times material herein, Charles Jones occupied the position of Respondent's President and is now, and has been at all times material herein, an agent of Respondent within the meaning of Section 2(13) of the Act.

6.

(a) At all times material herein Respondent, as a constituent member of a joint representative, and Kaiser have been parties to a collective bargaining agreement, herein called the Agreement, covering certain of Kaiser's employees in an appropriate bargaining unit, herein called the Unit. The Agreement is effective by its terms from March 1, 1989 to March 1, 1992.

(b) The Agreement contains, inter alia, a provision requiring certain classifications of Unit employees serviced by Respondent to become members of Respondent and to maintain their membership in Respondent as a condition of continued employment with Kaiser.

(c) At all times material herein James Gilbert, Donald Hall, Joseph Gaxiola and Arthur Rose, herein called the Protestors, have been, and are, members of Respondent employed in the Unit.

7.

(a) In and about mid- to late-1988, the Protestors engaged in activities protesting a merger involving Respondent, seeking the removal from the Unit of a number of job classifications, including their own job classifications, and substitution of an alternative representation scheme not involving Respondent, herein called the Protest Activities.

(b) The Protest Activities were protected concerted activities within the meaning of Section 7 of the Act.

(c) On or about December 19, 1988, Respondent disciplined the Protestors, including by suspending them from office and barring them from holding any elected or appointed office or position in Respondent for varying periods of time, and prohibiting them from attending any meetings or functions of Respondent for varying periods of time excepting only those meetings involving the ratification of Unit collective bargaining agreements, herein called the Discipline.

(d) The Discipline substantially impaired the membership rights of the Protestors.

(e) The Discipline was imposed because of the Protestors' protected concerted activities, including the Protest Activities.

8.

On or about August 7,1989, Respondent, by letter, threatened to cause Kaiser to discharge the Protestors if they discontinued paying membership dues to Respondent.

9.

By the acts and conduct described above in paragraph 8, and by each of said acts, in the circumstances described above in subparagraph 7(d) or, alternatively, the circumstances described above in subparagraphs 7(a) – (e), Respondent has restrained and coerced, and is restraining and coercing, employees in the exercise of their rights under Section 7 of the Act, and Respondent thereby has been engaging in unfair labor practices affecting commerce within the meaning of Section 8(b)(1)(A) and Section 2(6) and (7) of the Act.

* * * *

[Notice of hearing omitted]

DATED AT Oakland, California this 14th day of December, 1989.

/s/
JAMES S. SCOTT, REGIONAL DIRECTOR
National Labor Relations Board
Region 32
P.O. Box 12983
Oakland, California 94604

APPENDIX F

DECISION AND ORDER

OF THE

NATIONAL LABOR RELATIONS BOARD

IN

TRANSPORTATION WORKERS LOCAL 525

May 12, 1995

[317 NLRB No. 62]

Transportation Workers Union of America, AFL–CIO and its Local 525 (Johnson Controls World Services, Inc.) *and* Douglas J. Nelson.
Case 12-CA-3801

May 12, 1995

DECISION AND ORDER

BY MEMBERS BROWNING, COHEN, AND TRUESDALE

On February 21, 1995, Administrative Law Judge William N. Cates issued the attached decision. The General Counsel filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

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[1] We agree with the judge that no issue concerning *Communications Workers of America v. Beck*, 487 U.S. 735 (1988), was raised or litigated in this case.

[2] In adopting the judge's conclusions, we specifically affirm his interpretation of *Boilermakers (Kaiser Cement Corp.)*, 312 NLRB 218 (1993).

Dated, Washington, D.C. May 12, 1995

Margaret A. Browning, Member

Charles I. Cohen, Member

John C. Truesdale, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Michael Maiman, Esq., for the General Counsel.
Joseph Egan Jr., Esq. (Egan, Levy & Swicia, P.A.), of Orlando, Florida, for the Union.

DECISION

STATEMENT OF THE CASE

WILLIAM N. CATES, Administrative Law Judge. This is an unfair labor practice prosecution brought by the National Labor Relations Board's (Board) General Counsel acting through the Acting Regional Director for Region 12 in the form of a complaint and notice of hearing (complaint) issued on June 30, 1994,[1] against the Transportation Workers Union of America, AFL-CIO and its Local 525 (Union). The complaint is based upon an unfair labor practice charge filed by Douglas J. Nelson an individual (Nelson) on February 17. I heard the case on November 7.

The case involves the scope of the Union's authority to enforce the discharge provisions in the union-security clause outlined in its collective-bargaining agreement with Johnson Controls World Services, Inc. (Company). More specifically, it is alleged Local Union President Eddie Hill (President Hill) threaten Nelson with

[1] All dates hereinafter are 1994, unless otherwise indicated.

application of the discharge provisions of the union- security clause[2] should Nelson cease paying dues or agency fees when Nelson had previously been expelled[3] from the Union for circulating a petition seeking authorization from employees for another labor organization (Aero Space Maintenance Workers Union) at a time during which a petition could lawfully have been filed with the Board with such activity allegedly being protected by Section 7 of the National Labor Relations Act (Act). If as counsel for the General Counsel (Government) asserts the Union committed an unfair labor practice, a second issue is whether President Hill acted as an agent of the International Union in the actions he took herein. I will, as more fully explained, conclude the Union did not violate the Act in any manner alleged in the complaint. Accordingly, I need not reach the second issue.

FINDINGS OF FACT

I. JURISDICTION

The Company is a corporation with an office and place of business at Eastern Space and Missile Center, Cape Canaveral Air Force Station, Florida, where it is engaged in the business of providing ground support services for the United States Air Force. During the year preceding issuance of the complaint herein, a representative period, the Company provided services in excess of $50,000 to the United States Air Force pursuant to a service contract with the United States Government. The complaint alleges, the evidence establishes, and I find the Company is, and has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

---

[2] The union-security clause involved provides for the discharge of an employee upon the Union's request when the employee has not paid the legally required agency fees or union dues. The lawfulness of the clause is not at issue herein.

[3] The parties stipulated the expulsion by the Union was lawful.

II. LABOR ORGANIZATION

The record establishes that at all times material herein, the International Union and its Local 525 have been and are labor organizations within the meaning of Section 2(5) of the Act.

III. THE FACTS

The Union and Company are parties to a collective-bargaining agreement which contains a union-security clause that provides for the discharge of an employee upon the Union's request, when that employee has not paid or tendered payment of representation fees or initiation fees and membership dues.[4] The facts surrounding the allegations herein are for the most part undisputed. Any conflicts will be addressed as they arise.

Nelson began working for the Company on August 25, 1975, and became a member of the Union approximately 90 days later. He remained a member of the Union until, he asserts, he was expelled from membership in September 1992. During the time Nelson was a member of the Union he held the offices of shop steward, executive board member, vice president, and president.

On or about August 17, 1992, Nelson signed (as did several other employees) and circulated a petition seeking authorization from employees for representation by another (Aero Space Maintenance Workers Union) labor organization.[5] No petition was, however, filed with the Board.[6] Shortly after starting his presidency, President Hill became aware there was a movement trying to

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[4] No *Communication Workers of America v. Beck*, 487 U.S. 735 (1988) issue was raised or litigated in this case.

[5] Nelson held himself out to be and signed documents as vice president of the Aero Space Maintenance Workers Union. Nelson was also a member of the Union herein at the same time.

[6] The Union stipulated at trial that these events occurred during a time in which a petition could have been properly filed with the Board.

form a separate labor organization even though he was not immediately aware Nelson was involved.[7]

On or about August 28, 1992, President Hill informed Nelson in writing he had filed intraunion charges against him (Nelson) for his activities related to the petition for the rival labor organization.[8] According to President Hill, Nelson was ultimately expelled from membership in the Union because of his above-referenced activities.

In December 1992, Nelson wrote President Hill[9] expressing a belief he was no longer responsible for payment of union dues inasmuch as he had been expelled from the Union. Nelson testified President Hill thereafter sent him a memorandum outlining the procedure for becoming a *Beck*[10] objector and expressed the hope this would take care of the matter.

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[7] Hill and Nelson have remained friends since they met in the early 1980s.

[8] Pertinent parts of Hill's letter states: "I, Eddie O. Hill, do hereby file charges against Douglas J. Nelson."

The charges are as follows:

> D) Advocating or attempting to bring about the withdrawal from the International Union or any Local Union, or any member or group of members
>
> F) Working in the interest of or accepting membership in any organization dual to the International Union.

[9] Pertinent parts of Nelson's letter follows:

> Since I have been expelled from membership in the Transport Workers Union by action of the Local Executive Board and no longer have any rights as a Union Member or any say in the affairs of the Union or will have at any time in the future, I feel that paying union dues to an organization that I have been expelled from is improper. I have spoken to the National Labor Relations Board about this matter and have been advised that being forced to pay Union Dues as a condition of employment after being expelled from the Union would constitute an Unfair Labor Practice on the part of the Union.

[10] *Communications Workers v. Beck*, supra.

The record is somewhat unclear regarding what took place immediately thereafter; however, Nelson continued to pay union dues until December 1993, at which time he ceased doing so.

Thereafter President Hill wrote Nelson the following letter:[11]

February 4, 1994

Douglas J. Nelson
12712 Forestedge Circle
Orlando, Florida 32828

Dear Mr. Nelson:

As a nonmember, you are entitled to pay full dues or, in the alternative, you are required to pay agency fees. You have paid nothing to the Local for the months of December 1993, January, and February, 1994. You are thus delinquent in the amount of $94.83 (31.61 per month) for agency fees. Please take care of this arrearage immediately.

In the future, if you wish to hand pay, the amount of $31.61 is due by the first of each month. If you wish to use check-off, the regular dues amount will be deducted but you will be eligible for a rebate at the end of the year.

Sincerely,
/s/Eddie O. Hill
Eddie O. Hill, President
TWU-Local 525, AFL-CIO

Nelson testified he telephoned President Hill on February 8, because he had questions regarding his status with the Local Union. Nelson asked President Hill why he sent the February 4 letter instead of the International Union as called for in the collective-

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[11] Hill testified sending letters such as the one to Nelson was consistent with the Union's standard policy.

bargaining agreement.[12] According to Nelson, Hill said it was because of their past friendship. Nelson testified he next asked Hill how long his expulsion was for and Hill said he didn't know. Nelson asked Hill since there was no date on the expulsion order was it safe to assume the expulsion was forever. According to Nelson, Hill said he guessed so. Nelson asked President Hill a number of questions regarding his rights related to attending union meetings, running for office, nominating candidates for office, attending union functions, or participating in collective bargaining. Nelson testified Hill said he could not do or participate in any of these activities. Nelson asked President Hill about whether if "in the future he fail[ed] to remit union dues, would the union seek [his] termination under the Agency Shop Clause." Nelson testified Hill said yes and they ended their telephone conversation.

President Hill acknowledged he probably did not recall the telephone conversation in question as well as Nelson did. Hill said Nelson "questioned" him on his expulsion and wanted to know if it was forever. Hill testified he told Nelson he simply didn't know. According to Hill, Nelson kept asking questions along the lines of could his expulsion be forever, and Hill responded he guessed so.[13] President Hill testified Nelson asked what would happen if he didn't pay any dues. Hill told Nelson, "Doug let's don't do that. You'd force me to enforce what's in the contract."

President Hill testified the Union never at any time sought Nelson's discharge. Nelson testified that since his expulsion he has not made any attempts to be reinstated to membership. Nelson explained, "[i]f I thought it would be well received, I would" Nelson has, at least as of the trial herein, continued to pay union dues and has remained gainfully employed by the Company.

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[12] Nelson explained the collective-bargaining agreement called for an International Union representative to send such a letter and that part of the letter was to remind the delinquent member that he/she had 15 days to pay up or the International Union would seek his/her discharge.

[13] Hill said the conversation was nonconfrontational.

President Hill and Nelson both appeared to be testifying truthfully to the best of their recollection. Although their testimony regarding their February 8 conversation may seem to conflict somewhat; any conflicts are not material and do not impact the outcome herein. To the extent that it is helpful, I find Nelson's recollection of the conversation to be better than President Hill's. Hill appears to acknowledge as much.

IV. DISCUSSION, ANALYSIS, AND CONCLUSIONS

Counsel for the General Counsel argues it is clear Nelson was permanently expelled from membership in the Union because he attempted to oust the Union herein as the collective-bargaining representative of certain employees of the Company and replace it with a rival labor organization. Counsel for the General Counsel urges Nelson's activities are protected by Section 7 of the Act. Counsel for the General Counsel argues the Board has consistently held a union may not lawfully invoke the union-security clause of its contract against an employee whose full union membership has been significantly impaired due to the exercise of Section 7 rights. Although counsel for the General Counsel cites a number of cases in support of his position he relies primarily on two cases, namely, *Steelworkers Local 4186 (McGraw Edison)*, 181 NLRB 992 (1990), and *Communications Workers Local 9509 (Pacific Telephone)*, 193 NLRB 83 (1971). Counsel for the General Counsel states that although the Board has made it clear in these (and like) cases, it finds no fault with internal union discipline imposed for engaging in rival union or protected decertification activities, it does find unlawful the invocation of a union-security clause where membership has been impaired for the exercise of Section 7 rights. Counsel for the General Counsel summarizes his position by stating that under *McGraw Edison* and *Pacific Telephone* Nelson's membership status was lawfully impaired, but he argues the Union violated Section 8(b)(1)(A) of the Act by threatening to enforce a union-security clause against him. Finally, counsel for the General Counsel argues, at length, that the Board's decision in *Boilermakers (Kaiser Cement Corp.)*, 312 NLRB 218 (1993), does not require a contrary result than that which he advocates. Counsel for the General Counsel acknowledges that the Board in *Kaiser* found no

violation of the Act where union members were disciplined—barred from holding union office or attending union meetings for fixed numbers of years—because they circulated petitions designed to remove substantial numbers of positions from the bargaining unit. Counsel for General Counsel urges two distinguishing factors between *Kaiser* and *McGraw Edison*, first he urges the disciplined individuals in *Kaiser* remained members of the union (albeit with substantially impaired rights) and that the judge in *Kaiser* found no nexus between one of the four individuals' decertification activities and the discipline imposed.

Counsel for the Union argues the Union's conduct herein is fully consistent with and controlled by the Board's decision in *Kaiser*. Counsel for the Union contends the Board in *Kaiser* acknowledged the distinctions drawn by the trial judge in *Kaiser* between the protected/unprotected nature of the conduct giving rise to the union discipline but found making such a distinction unnecessary. Counsel for the Union argues that in *Kaiser* the Board focused on whether the discipline was lawful and not whether the conduct causing the discipline was protected or unprotected. The Union contends by doing so the Board in *Kaiser* necessarily rejected any suggestion in *McGraw Edison* that the protected/unprotected nature of the conduct given rise to the discipline was dispositive. Counsel for the Union asserts such a conclusion is inescapable because the conduct at issue in *Kaiser*—circulating a petition seeking to have the union removed so employees could bargain directly with the employer—clearly was protected. Counsel for the Union argues that *Kaiser* overruled *McGraw Edison* sub silentio and that the complaint herein must be dismissed.

A review of certain portions of the Act is helpful at this point. The Union is charged with having violated Section 8(b)(1)(A) of the Act which provides:

> (b) It shall be an unfair labor practice for a labor organization or its agents—
>
> (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in Section 7 [Section 157 of this title]: Provided, That this paragraph shall not impair the right of a

> labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein;

Section 7 (§ 157.) reads as follows:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor origination as a condition of employment as authorized in section 8(a)(3) [section 158(a)(3) of this title].

Section 8 (§ 158.) (a)(3)(B) provides:

> It shall be an unfair labor practice for an employer—
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: ... *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization ... (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

The two primary cases (*McGraw Edison* and *Pacific Telephone*) that counsel for the General Counsel relies on in support of a finding of a violation *initially* seem persuasive.

In *Pacific Telephone* two individuals (Lavers and Coupar) were expelled from membership in the Communications Workers of America, Local 9509 (CWA) because of their activities related to distributing literature and membership cards for the Independent

Organization of Pacific Employees for the purpose of obtaining signatures to decertify CWA as bargaining agent for certain Pacific Telephone employees. CWA expelled Lavers and Coupar pursuant to its constitution which provides for the fining, suspension, or expulsion of any member found guilty at a union trial of willfully supporting or assisting any persons, groups of persons, or organizations in any act or activities for the purpose of seeking or obtaining the decertification or replacement of CWA as collective-bargaining representative. After being expelled Lavers and Coupar refused to pay union dues to CWA. CWA then demanded that Pacific Telephone discharge Lavers and Coupar pursuant to its valid collective-bargaining agreement, which, under specified conditions, makes the payment of periodic dues a condition of employment. The Board citing *McGraw Edison* found CWA in violation of Section 8(b)(1)(A) of the Act.

Briefly summarized the Board in *McGraw Edison* found an 8(b)(1)(A) violation of the Act when the union insisted that an employee pay union dues on a penalty of discharge under a valid union-security agreement, during a period when his membership rights in the union had been significantly impaired by disciplinary sanctions imposed as a result of his filing a decertification petition. More specifically, in *McGraw Edison* employee Arnold Blaine filed with the Board a petition seeking decertification of the incumbent union. After the union was redesignated by a majority in an election the union initiated disciplinary proceedings against Blaine and he was initially expelled from the union. Blaine appealed and his membership was reinstated, but the union suspended his right to attend union meetings for a period in excess of 1 year and indefinitely suspended him from holding union office. Thereafter Blaine refused to pay union dues and the union threatened to invoke the union-security clause against him. Blaine thereafter paid dues to the union. The Board viewed *McGraw Edison* as placing in issue its policy of providing unimpeded access to its procedures and remedies. The Board citing *NLRB v. Marine & Shipbuilders*, 391 U.S. 418, 425 (1968), noted that any coercion used to discourage or defeat access to the Board is beyond the legitimate interest of a labor organization. The Board noted it was not confronted in *McGraw Edison* with a situation where a union disciplined a

member because the member filed a decertification petition simply by fining, expelling, or suspending the member. The Board acknowledged a reduction in membership rights standing alone does not necessarily violate the Act. The Board stated, however, that for the union to insist upon Blaine's continued payment of dues during periods when his rights as a member were significantly reduced constituted a continuing form of coercion attempting to operate as a "serious restraint" upon access to its processes. Specifically the Board concluded:

> The Union's insistence upon Blaine's payment of dues, on pain of discharge, cannot be considered as disassociated from the suspension of membership rights resulting from his decertification activity. We see no justification, either in the proviso to Section 8(b)(1)(A) or in considerations of a labor organization's need for self preservation, for the steps taken against Blaine. The threat to enforce the union-security clause while continuing the sanctions against Blaine was hardly necessary to preserve the Union's existence as an institution, nor could it be viewed as a noncoercive form of internal discipline which would have no discouraging effect upon a member's decision to invoke the Board's representation procedures.
>
> It is for these reasons that we affirm the Trial Examiner's finding that a labor organization violates Section 8(b)(1)(A) by invoking, or threatening to invoke, a lawful union-security clause to enforce payment of dues by a member whose membership has been significantly impaired because he filed a decertification petition.[6]

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[6] As our decision in this case is based on the coercive steps taken as a result of filing a decertification petition, we need not pass upon whether a labor organization violates Section 8(b)(1)(A) through enforcement of a union security clause against a member whose membership was impaired for reasons unrelated to seeking access to Board decertification processes.

In two other cases cited by counsel for the General Counsel the Board found violations of the Act where labor organizations sought payment of dues from suspended members under threats to seek

their discharge pursuant to valid union-security provisions contained in collective-bargaining agreements. In *Dillingham Tug & Barge Corp.*, 278 NLRB 83 (1986), the Board adopted Judge James M. Kennedy's finding a violation of Section 8(b)(1)(A) of the Act where the union suspended employee/union member Francis Keane's membership for 15 years and fined him $863 as a result of his activities on behalf of a rival labor organization. Judge Kennedy wrote:

> Furthermore, it is clear that the expulsion and fine levied against him were based on his action in supporting the rival union. That, of course, is an activity protected by Section 7 of the Act. Respondent Union has, therefore, deprived Keane of the rights attendant full membership in the Union. Thus, when Respondent Union suspended him it simultaneously stripped him of any obligation to pay union dues. Section 8(a)(3)(B), as incorporated by Section 8(b)(2), states that it is unlawful to discharge or cause the discharge of an employee on union security grounds if that employee has been denied union membership for reasons other than his failure to tender periodic dues. Clearly that is the case here. Respondent Union suspended Keane because of his rival union activity. By that very act it denied him membership on grounds other than a failure to pay periodic dues. He was, therefore, not obligated to pay any dues whatsoever while membership was denied him.

In *Telephone Traffic Union*, 241 NLRB 826 (1979), the Board affirmed Judge George Norman's finding the union unlawfully threatened Louise Neunder with discharge pursuant to the agency-shop provisions of the governing collective-bargaining agreement unless she paid dues during a period in which she had been suspended from membership in the union for supporting the organizational efforts of a rival union. The Board in *Telephone Traffic Union* made it expressly clear the union's actions violated Section 8(b)(1)(A) of the Act even though Neunder was suspended because she exercised her Section 7 rights to support a rival union rather than to file a decertification petition.

Looking *only* at the above-referenced cases I am persuaded counsel for the General Counsel established a violation of Section 8(b)(1)(A) of the Act. The Board in the cases outlined above has made it clear a union may not invoke a union-security clause of a collective-bargaining agreement against an employee whose full union membership has been significantly impaired due to the exercise of Section 7 rights.

Turning to the instant facts I first note the Company and Union are parties to a collective-bargaining agreement with a valid union-security clause which provides for the discharge of an employee upon the Union's request if the employee does not pay the required agency fees. In August 1992, Nelson, a longtime employee and union office holder, signed and circulated a petition seeking to have a rival labor organization designated as the collective-bargaining representative for certain employees who were at the time (and continue to be) represented by the Union herein. On or about August 28, 1992, the Union (through President Hill) brought intraunion charges against Nelson because of his activities on behalf of the rival labor organization and thereafter expelled him from the Union. Nelson inquired and was told his expulsion could last forever. Nelson stopped paying dues to the Union in December 1993 and on or about February 4, 1994, was notified by the Union of his delinquency and asked to bring his dues current. On or about February 8 Nelson asked President Hill if in the future he failed to remit union dues would the Union seek his termination pursuant to the parties agency-shop clause in their collective-bargaining agreement. Hill responded in the affirmative.

Without specifically setting forth the elements of a violation drawn from the cases outlined earlier it is clear counsel for the General Counsel established a prima facie violation of the Act. This however does not resolve the matter.

Next I turn to an examination of the case relied upon by the Union in support of its contention the complaint must be dismissed. The Union argues the Board in *Kaiser* sub silentio overruled the cases relied on by counsel for the General Counsel and further urges that counsel for the General Counsel is wrong when he argues

Kaiser does not require a contrary finding to that advocated by counsel for the General Counsel.

In *Kaiser* the Board looked at whether the union violated Section 8(b)(1)(A) of the Act by threatening four dissident employee members with enforcement of the union-security clause if they discontinued paying membership dues after the union had substantially impaired their membership rights. The Board in *Kaiser* concluded the union did not violate the Act. In *Kaiser* the union disciplined four members for their activities which if successful would have eliminated all or a substantial part of the bargaining unit. One of the four was charged with bargaining with the company in order to disband the union and have the jobs converted into salaried positions. Two of the others were charged with aiding and abetting the activities of the first member and the fourth member was charged with circulating a petition seeking to eliminate the bargaining unit altogether. All four were found guilty as charged and all were barred from holding union offices and from attending union meetings except for meetings at which a contract directly affecting them was to be voted upon. The barrings ranged from 2 to 5 years. The one dissident that had been serving as local union president was suspended from office. The four wrote the international union president claiming the union had "in effect" suspended them from union membership and as such they were not required to pay union dues. The international union president responded that they had not been suspended from membership and they had an obligation to continue to pay dues. The four in *Kaiser* inquired of the international union president what penalties would be imposed if they ceased paying union dues. The international union president responded that if they failed to pay dues the union would inform the employer and the four "would no longer be allowed to work at the plant." In *Kaiser* Judge Michael D. Stevenson made an overall finding, which the Board affirmed, that the union had the right to protect itself against the alleged discriminatees activities which would have resulted in the erosion or the elimination of the bargaining unit it represented. Judge Stevenson concluded the General Counsel did not establish a prima facie case that the discipline violated Section 8(b)(1)(A) of the Act. Judge Stevenson also concluded, with Board approval, the Union did not violate the

Act by threatening to invoke the union-security clause of its collective-bargaining agreement because the alleged discriminatees were attempting to change either half or all of the bargaining unit jobs into salaried and/or supervisory positions. Judge Stevenson concluded the union had a *legitimate union interest* in preventing the erosion of its status as collective-bargaining representative. Although the Board in *Kaiser* noted "[Judge Stevenson] stressed that [*Kaiser*] is distinguishable from *Local 4186, United Steel Workers of America (McGraw Edison Co.)*, 181 NLRB 992 (1970), in that the Board there found that the union had unlawfully threatened to invoke the union security clause against a member whose membership it had significantly impaired because of the employee's protected conduct in filing a decertification petition" it also noted:

> The judge also rejected the General Counsel's alternate contention that even if the activities for which the Respondent disciplined the alleged discriminatees were not protected, the Respondent had so significantly reduced their membership rights that it could not lawfully enforce the union-security clause against these employees. The General Counsel's argument, in the judge's view, presented the Respondent with the "Hobson's choice" of either forgoing its right to discipline members under the proviso to Section 8(b)(1)(A) (thereby rendering the proviso to Section 8(b)(1)(A) a nullity) or relinquishing its right to enforce the provisions of a valid union security clause (thereby ultimately self-destructing without the dues of disciplined members). The judge concluded that the General Counsel's position, if implemented, would induce any members who are unwilling to pay dues in the first place for financial or philosophical reasons to subject themselves to union discipline "so they would be "punished" by not having to pay union dues, although they would, continue their employment." For these reasons, the judge dismissed the complaint.

The Board in *Kaiser* found two actions involved, "(1) the Union's internal discipline of certain employees, which discipline impaired their membership in the Union; and (2) the enforcement of a union security clause against those employees, notwithstanding

the fact that their membership was impaired." The Board continued "[t]hese two matters are analytically distinct, although in a given case they may be related." The Board pointed out "[I]f discipline is wholly internal, i.e., if it does not itself affect the employment relationship the Union may be able to impose the discipline even if it is aimed at a Section 7 right." The Board noted some examples but then observed:

> To be sure, there are limitations on the Union's right to impose discipline on members. One of these limitations is that the employee-members must be free to resign their membership and thereby escape the rule.[6] That is, employees have a right to resign from the union. If they resign prior to engaging in the Section 7 conduct deemed offensive by the union (e.g., crossing a picket line), the union cannot discipline them. If they have opted for continued membership, they cannot be heard to complain if the union enforces the rules of membership.

---

[6] *Scofield v. NLRB*, 394 U.S. 423 (1969).

The Board noted a second exception:

> There is another important exception to the general rule concerning a union's right to impose internal discipline on members. If the union's rule impairs a policy that Congress has embedded in the labor laws, the union may not enforce the rule, even against a member. Of Course, as we have seen, the mere fact that the discipline is in reprisal for a Section 7 right is not sufficient to condemn the discipline. See *Allis-Chalmers*. However, if the Section 7 right is the fundamental one of seeking access to the Board, the discipline in reprisal therefor may be unlawful.[7] Thus, for example, if the employee files a petition or a charge with the Board, the union cannot fine him for that action.[8]

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[7] The Sec. 7 right of seeking access to the Board is fundamental in the sense that all others are dependent on it. If the employee cannot come to the Board, he cannot vindicate any of his rights.

[8] See *NLRB v. Marine & Shipbuilding Workers*, 391 U.S. 418 (1968); *Molders Local 125 (Blackhawk Tanning Co.)*, 178 NLRB 208 (1969).

Does, as the Union contend, *Kaiser* control the instant case warranting dismissal of the complaint or is, as counsel for General Counsel contends, *Kaiser* distinguishable?

First, I note Nelson was a member of the Union at the time he engaged in the conduct the Union found offensive. There is no showing he could not have resigned his membership and escaped the discipline. Nelson's conduct of signing, circulating, and seeking to have others sign a petition to designate a rival labor organization as bargaining representative of certain employees of his employer was conduct designed to oust the Union herein from its role as collective-bargaining representative of the employees in question. Nelson was not only trying to oust the Union herein he was trying to have a rival labor organization installed that he was the vice president of. Nelson was defeated in his bid to again serve as president of the Union herein. The parties stipulated, and the record evidence supports the stipulation, that the Union legally imposed discipline on Nelson.

Having concluded, as outlined above, that the discipline was lawful the next issue under the analytical framework of *Kaiser* is whether the Union could threaten to enforce its contractual union-security clause against Nelson. There is somewhat limited guidance on this point in *Kaiser*. In that regard, the Board in *Kaiser* held, "[b]ecause the Respondent's discipline of these members did not violate the Act, the members continued, as unit employees, to be required under the union-security agreement to satisfy the sole obligation a union may enforce under a union-security provision: 'the tendering of uniform initiation fees (if any) and dues.'" (Footnote omitted.) Obviously the first requirement outlined above has been satisfied, namely that the discipline did not violate the Act. A critical question arises with respect to the remainder of the quote "the members continued, as unit employees, to be required under the union-security agreement to satisfy the sole obligation a union may enforce...." "Did the Board intend the operative word in this

part of the quotation to be "members"? The overall tenor of the *Kaiser* decision persuades me it did not. The Board's main concern was whether the discipline was legally imposed. The Board's lengthy inclusion in *Kaiser* of Judge Stevenson's discussion of the "Hobson's choice" situation a union is placed in persuades me the Board did not intend for a union in a factual situation such as the one herein to have to chose between its right to discipline a member under the proviso to Section 8(b)(1)(A) of the Act and its right to enforce the provisions of a valid union-security clause. Nelson's conduct was directed toward the destruction of the Union that rejected him as its president and have the collective-bargaining representative replaced with a rival labor organization of which he was an officer, namely vice president. *Kaiser* makes it clear a union may protect its position in such situations.

It is obvious, as pointed out by counsel for the General Counsel, the Board was well aware of *McGraw Edison* and related cases when it decided *Kaiser* and it did not avail itself of the opportunity to expressly overrule these earlier decisions. I am, however, persuaded in agreement with counsel for the Union, that the Board overruled sub silentio all prior contrary cases when it decided *Kaiser*.

In light of all the above, I conclude the Union did not violate Section 8(b)(1)(A) of the Act by threatening to invoke the union-security clause against Nelson if he ceased paying dues after the Union disciplined him. Accordingly, I shall dismiss the instant complaint.

CONCLUSIONS OF LAW

1. Johnson Controls World Services, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Transportation Workers Union of America, AFL–CIO and its Local 525 are labor organizations within the meaning of Section 2(5) of the Act.

3. The Union has not engaged in the unfair labor practices alleged in the complaint.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[14]

ORDER

The complaint is dismissed in its entirety.

Dated, Washington, D.C. February 21, 1995.

[14] If not exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(2)

Supreme Court, U.S.
FILED
DEC 7 1995
CLERK

No. 95-744

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

JAMES GILBERT,

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD

and

INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS, AFL-CIO,

Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS, AFL-CIO, CFL, IN OPPOSITION TO WRIT

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No. 95-744

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1995

JAMES GILBERT,
Petitioner

V.

NATIONAL LABOR RELATIONS BOARD

and

INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS, AFL-CIO,
Respondents

STATEMENT OF THE CASE[1]

At all material times, Petitioner James Gilbert was an employee of Kaiser Cement Corporation and a member of Respondent International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers. In September 1988, Gilbert

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[1]Respondent agrees that Petitioner has timely filed his writ with this Court. This Court properly has jurisdiction to consider the writ, as provided in 28 U.S.C. § 1254(1).

presented a company proposal to members of Boilermakers Local D-100 that would have converted 17 of 37 or 38 bargaining unit jobs to salaried, nonunion positions. Pet. App. 32a-34a. At that time, Gilbert served as president of Local D-100. Pet. App. 29a. Under this proposal, Gilbert's job would have become nonunion. Pet. App. 35a. Gilbert allowed the proposal to be put to a vote, and the members of the bargaining unit rejected it 23 to 11. Id.

Internal union charges were brought against Gilbert for this conduct. Pet. App. 37a.[2] A disciplinary hearing was held on November 19, 1988, and Gilbert was found to have violated the Boilermaker's constitution. Pet. App. 39a.[3] As a sanction for his wrongful conduct, Gilbert was precluded from holding union office for five years and from attending union meetings, except those at which a contract affecting him was to be considered, during that period. Pet. App. 39a-40a.

In April 1989, Gilbert wrote to Boilermaker President C.W. Jones asking whether he had been "suspended" from the

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[2]Three other members were also charged and ultimately disciplined for related activity. They did not file unfair labor practices charges and pursue no claim before this Court.

[3]Gilbert has not and does not now challenge the propriety of the hearing or the provisions of the constitution under which he was disciplined.

union and was, therefore, relieved of the obligation to pay dues. President Jones informed Gilbert that he had not been suspended and was expected to pay dues to remain a member of the Boilermakers. Pet. App. 40a-42a. Gilbert then wrote to President Jones asking "what penalties might be imposed if we discontinued paying dues . . . ." President Jones informed Gilbert that the union would seek to enforce the union-security clause in the labor agreement between the Boilermakers and Kaiser Cement. Pet. App. 43a-44a. Gilbert briefly stopped paying dues, and the union so informed the company. Gilbert then made up the arrearage and started paying dues again. His employment status was not affected. Pet. App. 44a-45a.[4]

In December 1989, the National Labor Relations Board issued a complaint alleging the Boilermakers violated § 8(b)(1)(A) of the National Labor Relations Act by coercing Gilbert in the exercise of rights protected under § 7 of the Act. Pet. App. 27a. Following a trial, an administrative law judge found the union did not violate the Act. Pet. App. 55a. The Board affirmed. Pet. App. 27a. The Court of Appeals for the District of Columbia Circuit denied Gilbert's petition for review of the Board's ruling.

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[4]Gilbert does not challenge the propriety of the union-security agreement in the Boilermaker contract with Kaiser Cement. He has not even presented the language of that clause to this Court.

Pet. App. 18a. Petitioner's writ followed.

SUMMARY OF ARGUMENT

Petitioner Gilbert attempts to induce this Court to grant certiorari on a series of questions addressing the financial obligations of workers to pay union dues pursuant to lawful agency or union shop agreements. Certiorari is inappropriate because Petitioner's questions either are not factually presented in this case or have been foreclosed by controlling decisions of this Court. Ultimately and almost surreptitiously, Petitioner urges on this Court a result that would sanction a class of free riders -- workers who benefit from a union's collective bargaining efforts yet avoid making any monetary contribution toward the cost of securing advantageous terms and conditions of employment -- in contravention of *Communications Workers v. Beck*, 487 U.S. 735, 749-50 (1988). Not only would this result crack the legal foundation upon which *Beck* was built, it would also border on the perverse inasmuch as only those workers disciplined for violations of union rules would qualify for free-rider status.

Petitioner incorrectly contends this case raises a question reserved in *NLRB v. General Motors Corp.*, 373 U.S. 734, 745 n. 12 (1963), concerning the efficacy of labor agreements the terms of which preclude certain workers or groups of workers from attaining union membership. Petitioner here, however, was permitted to join the

union on the same terms and conditions as anyone else. The labor agreement treated all persons evenhandedly.

Petitioner also incorrectly contends the Court of Appeals decision in this case, which effectively refuses to endorse free-rider status for union members disciplined for breaking their organization's rules, conflicts with *Local 1104, Comm'n Wkrs. of America, AFL-CIO v. NLRB*, 520 F.2d 411, 420 (2d. Cir. 1975), *cert. denied*, 423 U.S. 1051 (1976). This is an artificial conflict in that this Court's intervening decision in *Beck* recognizes that free riders of any stripe need not be permitted and, accordingly, undercuts both the premise of and the result in the *Local 1104* opinion, issued some 13 years earlier.

Finally, Petitioner incorrectly contends his conduct was protected under § 7 of the Act, contrary to the findings below. Petitioner cites no authority suggesting promotion of a company proposal to convert bargaining unit jobs to nonunion positions is or should be protected. Whether particular conduct deserves § 7 protection is a fact-based determination entrusted to the Board's expertise, and any reasonably defensible decision should not be disturbed. Even if the discipline imposed on Petitioner were improper, he would not be entitled to stop paying dues and assume free-rider status as some sort of self-help remedy, as *Beck* makes clear.

In short, Petitioner can demonstrate neither a question of overriding public importance nor a genuine conflict among the circuit courts resulting from the extant judicial and administrative determinations in this case. Such questions or conflicts represent the hallmarks of cases deserving of review on certiorari. *NLRB v. Pittsburg Steamship Co.*, 340 U.S. 498, 502 (1951) ("Certiorari is granted only 'in cases involving principles the settlement of which is of importance to the public as distinguished from the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal.'" (quoting *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1923))). *See also United States v. Williams*, 504 U.S. 36, 44 (1992) (Court may grant certiorari to consider "an important issue expressly decided by a federal court . . . ."). Simply put, there is nothing here to warrant the expenditure of this Court's otherwise precious time, attention and judicial resources.

ARGUMENTS IN OPPOSITION TO GRANTING WRIT

I. This Case Fails to Present The Question Reserved in *NLRB v. General Motors*

A. The Legal Framework

Before turning to the precise questions Petitioner poses, it may be helpful to sketch briefly the contours of the relevant statutory and case law. Section 7 of the National Labor Relations Act, 29 U.S.C. § 157 permits employees to form labor

organizations, bargain collectively and to otherwise engage in concerted activities or to refrain from such activity, except to the extent they may be required to become members of a labor organization as a condition of employment pursuant to an agreement between a union and an employer. Pet. App. at 58a. Nonetheless, a union properly may impose internal discipline on its members for otherwise protected conduct provided a member may resign from the organization and, thus, avoid the sanctions. *Pattern Makers' League v. NLRB*, 473 U.S. 95, 101 (1985); *Scofield v. NLRB*, 394 U.S. 423, 428-30 (1969). In turn, § 8(b)(1), 29 U.S.C. § 158(b)(1), makes it an unfair labor practice for a union to "restrain or coerce . . . employees in the exercise of" their § 7 rights. By its own terms, however, this section "shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein . . . ." *Id.* Therefore, a union may discipline a member for conduct that falls within the ambit of § 7. *See, e.g., Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 196-97 (1967) (union properly disciplined members who refused to honor a strike, even though the refusal may have been protected under § 7).

A union, however, cannot demand that an employer terminate an employee for engaging in protected § 7 conduct. *Scofield*, 394 U.S. at 428. Likewise, a union cannot impose internal discipline at all if it would impair "an overriding policy of the labor laws . .

. ." *Id.*, at 429. The National Labor Relations Board has recognized that a union imposing internal discipline on a member who attempts to avail himself of the Board's processes, as by filing a decertification petition or an unfair labor practice charge, runs afoul of this rule. ***Molders Local 125 (Blackhawk Tanning Co.)***, 178 NLRB 208 (1969), *enforced* 442 F.2d 92 (7th Cir. 1971). *See also* ***NLRB v. Marine & Shipbuilding Workers***, 391 U.S. 418, 424 (1968).

Section 8(a)(3), 29 U.S.C. § 158(a)(3), prohibits an employer from discriminating in the terms and conditions of hiring or employment in a manner that encourages or discourages union membership. This section contains two qualifications. First, a union and an employer may enter into an agreement requiring an employee to become a member of the labor organization as a condition of employment. *Id.* Second, an employer may not discriminate against, e.g. by firing, a non-member employee if the union has declined to make membership available to that employee "on the same terms and conditions generally applicable to other members" or if membership has been denied or terminated for reasons other than nonpayment of dues "uniformly required as a condition of . . . membership." *Id.* Union-employer agreements requiring such membership are typically known as "union" or "agency" shop provisions. *See Oil Workers v.*

Mobil Oil Corp., 426 U.S. 407, 409 n. 1 (1976).[5]

For purposes of § 8(a)(3), "membership" is limited to the payment of dues and fees or, as this Court has said, its "financial core." *General Motors*, 373 U.S. at 742-43. Thus, a § 8(a)(3) or "financial core" union member owes no duties or obligations to the labor organization beyond the payment of dues.[6] In contrast, a "full member" typically agrees to abide by the union's internal rules and regulations and -- unlike the financial core member -- may be disciplined for violating those obligations. *General Motors*, 373 U.S. at 743. As this Court stated in *Pattern Makers' League*, 473 U.S. at 106:

> [U]nion security agreements permitted by § 8(a)(3) require employees to pay dues, but an employee cannot be discharged for failing to abide by union rules or policies with which he disagrees.

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[5]The agency and union shop agreements stand in contrast to the now-prohibited "closed" shop clauses requiring that an employer hire only current union members. *Oil Workers*, 426 U.S. at 409 n. 1.

[6]The financial-core member need only pay that portion of the dues and fees used for collective bargaining and representation purposes. *Beck*, 487 U.S. at 762-63.

> Full union membership thus no longer can be a requirement of employment. If a new employee refuses formally to join a union and subject himself to its discipline, he cannot be fired. Moreover, no employee can be discharged if he initially joins a union, and subsequently resigns.

In turn, § 8(b)(2) prohibits a union from inducing an employer to violate § 8(a)(3).

Finally, the Board has been accorded considerable latitude in interpreting and applying the Act, and the agency's application of the statutory provisions should be treated with deference. *Pattern Makers' League*, 473 U.S. at 114 ("Where the Board's construction of the Act is reasonable, it should not be rejected 'merely because the courts might prefer another view of the statute.'" (quoting *Ford Motor Co. v. NLRB*, 441 U.S. 488, 497 (1979))); *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891 (1984) (The Board's construction of the statutory language is "entitled to considerable deference, and the courts should "uphold any interpretation that is reasonably defensible."). *See also Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 844-45 (1984).

Analyzed against this backdrop, Petitioner's position warrants no substantive consideration in this Court beyond a

determination that further review is unjustified and certiorari should be denied.

B. The Question Reserved In *General Motors* Concerning the Scope of Union-Security Clauses Is Not Presented Here

At the outset, Petitioner suggests this case presents a question expressly reserved in *General Motors*, 373 U.S. at 744-45 n. 12, regarding the scope of permissible union shop agreements. Pet. at 8. This misapprehends both the question left unanswered in *General Motors* and the factual posture of this case, since the two never intersect.

The issue before the Court in *General Motors* was whether an employer commits an unfair labor practice by refusing to negotiate with a union over a proposed agency shop agreement. *Id.* at 734-35. The Court agreed with the Board that the employer's refusal violated the Act. *Id.* at 745. The particular agency shop proposal would have allowed each employee to choose whether or not to become a full member of the union, though everyone would have to pay dues. The Court found this to be consistent with the congressional purpose of "reduc[ing] the evils of compulsory unionism while allowing financial support for the bargaining agent." *Id.* at 744. In n. 12, the Court posed -- but did not answer -- a related question: Whether an agency shop agreement that by its terms barred certain employees from full union membership would comport with § 8(a)(3). That is, could an agency shop agreement, for example, preclude women or

Blacks from full union membership, while exacting dues from them?[7]

There is no issue here about the scope of the union security clause and whether its terms precluded certain employees from attaining full membership. Indeed, Petitioner has not even made the clause part of the record before this Court. Moreover, the union afforded Petitioner full membership. Petitioner concedes as much when he argues that his membership was different than that of others only after and as a result of the union discipline imposed on him. Pet. at 13. The Court of Appeals quickly and correctly disposed of this sophistry: "Membership was offered to Gilbert on the same terms as it was to other employees. This membership, however, included both rights and obligations. When Gilbert freely chose to violate his obligations, he was disciplined just as any other member would have been." Pet. App. at 10a.

In any event, however, the facts of this case simply fail to pose the question reserved in *General Motors*. This plainly is an insubstantial basis for granting certiorari.

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[7]At the time *General Motors* was decided, such discriminatory provisions would have presented very real concerns (as opposed to standing merely as forensic straw men), since the Civil Rights Act of 1964 had not yet been enacted. *See* 42 U.S.C. § 2000e-2(a), (c).

Petitioner apparently attempts to transmute the *General Motors* question into the "important issue" of whether "a requirement that employees financially support a union impairs a fundamental congressional policy" of voluntary unionism. Pet. at 8-9. This Court, of course, has already definitively addressed the issue in *General Motors*, 373 U.S. at 743-44; *Beck*, 487 U.S. at 750; and elsewhere, finding a requirement that employees pay for the core financial costs of union representation to be fully consistent with voluntary unionism.

II. The Disposition Here Does Not Overrule Prior Board Decisions and Is Mandated by This Court's Ruling In *Beck*

Petitioner next suggests this Court should grant certiorari because the Board in this case effectively overruled the so-called *McGraw Edison* line of earlier administrative decisions without explaining its reasons. Pet. at 9-12. Petitioner's argument rests on the fallacious premise that those cases are legally and factually apposite here. They are not.[8]

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[8]Even if Petitioner were correct, however, the appropriate result requires nothing more than a remand to the Board to provide an explanation for its decision here in light of the earlier rulings. An administrative agency's failure to explain a departure from or to explicitly distinguish seemingly controlling authority does not grant the reviewing court license to step in and determine the issues on the merits. Rather, the court should afford the agency the opportunity to tender its

A. The *McGraw Edison* Line Analyzed

The *McGraw Edison* cases generally concern persons denied union membership or whose full membership rights were suspended or terminated because they had engaged in protected § 7 activity. Here, the ALJ, the Board and the Court of Appeals found that Petitioner's conduct in directly dealing with the company to promote a plan that would have converted a significant number of bargaining unit jobs to salaried, nonunion positions fell outside the range of protected § 7 conduct.[9] Thus, the *McGraw Edison* cases simply are inapplicable, as the Court of Appeals noted. Pet. App. at 14a.

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rationale. This is well-settled law. *NLRB v. Metropolitan Life Ins. Co.*, 380 U.S. 438, 442-44 (1965); *Oil, Chemical & Atomic Workers Intern. v. NLRB*, 806 F.2d 269, 273-74 & n. 34 (D.C. Cir. 1986); *Intern. Ass'n of Bridge v. NLRB*, 792 F.2d 241, 248 (D.C. Cir. 1986).

[9]The ALJ found, *inter alia*, that Petitioner and his cohorts "were not disciplined for the exercise of any rights protected by Section 7 of the Act." Pet. App. at 53a. On review, the Board stated that "[W]e agree with the judge that the discipline was lawful." Pet App. at 26a. While the Board's decision is not as explicit on this point as it might have been, the tenor of the entire opinion supports this conclusion. The Court of Appeals so recognized. Pet. App. at 14a.

In each of those cases, the disciplined union member sought to stop paying any and all dues to the organization, at which point each of the unions attempted to invoke a union or agency shop agreement with the employer to cause the member's termination. These cases all pre-date this Court's decision in *Beck*, recognizing that Congress intended to preclude free riders and that all represented employees, whether full members or not, must make core financial contributions to the union. See, discussion, infra at 18-20. The detailed analysis in *Beck* makes clear that even a wrongfully disciplined union member cannot turn that discipline into an excuse for refusing to make core financial contributions to the union. In other words, improper union discipline does not vitiate the employee's duty to make core financial contributions to the organization, just as a non-member must. Here, of course, Petitioner was lawfully disciplined and wanted to quit paying all dues. The *McGraw Edison* cases, especially considered in light of *Beck*, provide no such refuge. The Court of Appeals so observed. Pet. App. at 12a.

In *Steelworkers Local 4186 (McGraw Edison Co.)*, 181 NLRB 992, 992 (1970), a union member was suspended from membership "for more than one year" because he filed a decertification petition with the Board. The member then refused to pay his dues, and the union sought his discharge from employment pursuant to a union-security clause in the labor agreement. The Board held that the

underlying suspension constituted an unfair labor practice and the union's effort to invoke the union-security provisions amounted to continued, unlawful coercion.[10]

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[10]The remaining five cases in the *McGraw Edison* line fall into a generally similar pattern: *Communications Workers Local 9509 (Pacific Tel. & Tel. Co.)*, 193 NLRB 83 (1971) (The Board finds the union committed an unfair labor practice by trying to enforce a union-security clause against a member who stopped paying dues after he had been expelled from the labor organization for circulating a decertification petition.); *Communications Workers Local 1104 (New York Tel. Co.)*, 211 NLRB 114 (1974), *enforced*, 520 F.2d 411 (2d. Cir. 1975), *cert. denied*, 423 U.S. 1051 (1976) (The Board upholds an ALJ determination that the union committed unfair labor practices by attempting to enforce union-security clauses against persons who declined to pay dues after they had been denied membership because they either crossed a picket line during a strike or participated in the organizational activities of a rival union.); *Telephone Traffic Union (New York Tel. Co.)*, 241 NLRB 826 (1979) (The Board finds the union committed an unfair labor practice by threatening to enforce a union-security clause against a member who wanted to stop paying all dues after she had been suspended from the union for one year for participating in the organizational efforts of a rival union.); *Inland Boatman's Union of the Pacific (Dillingham Tug & Barge Co.)*, 276 NLRB 1261 (1985) (The Board upholds a finding that the union engaged in an unfair labor practice by seeking enforcement of a union-security clause against members who quit paying dues after they had been suspended from the organization for periods up to 19 years for

B. The *McGraw Edison* Line Is Inapplicable, Particularly In Light Of *Beck*

As noted previously, the *McGraw Edison* line of cases is irrelevant here, since the activities for which Petitioner was sanctioned enjoyed no § 7 protection. Accordingly, there could be no § 8(b)(1) violation, which, by definition, requires that a union "restrain or coerce" employees exercising "rights guaranteed in section 7 . . . ."

Moreover, the *McGraw Edison* cases are based on the notion that a union member may refuse to pay any and all dues as some sort of self-help remedy against union discipline he or she perceives as unfair or unlawful. Petitioner likewise suggests that a union member who has been disciplined may refuse to pay all dues, thus becoming a free rider. Plainly, this proposition cannot stand in the face of the detailed analysis in *Beck* demonstrating a clear congressional intent in enacting § 8(a)(3) both to eliminate

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supporting a rival union.); *Machinists District 94 (McDonnell Douglas)*, 283 NLRB 881 (1987) (The Board upholds a finding that the union committed an unfair labor practice by attempting to enforce a union security clause against members who lawfully resigned from the organization, ceased paying dues, and following their resignations crossed a picket line to continue working -- conduct for which the union then fined and otherwise sanctioned them.).

compulsory union membership as a condition of employment and to preclude free riders. *Beck*, 487 U.S. at 747-49.

While Congress wished to eliminate "the abuses associated with" closed-shop agreements, it was "equally concerned, however, that without such agreements, many employees would reap the benefits that unions negotiated on their behalf without in any way contributing financial support to those efforts." *Id.* at 748. Thus, "§ 8(a)(3) was designed to remedy the inequities posed by 'free riders' who would otherwise profit from the Taft-Hartley Act's abolition of the closed shop." *Id.* at 753-55. In short, the section's "legislative justification" lay in "ensuring that nonmembers who obtain the benefits of union representation can be made to pay for them . . . ." *Id.* at 759.[11]

This Court noted and, indeed, highlighted the congressional determination that "no employee" benefiting from collective bargaining efforts of a union should be absolved of the obligation to pay his or her fair share of the costs of those efforts. *Id.* at 750. The Court stated: "'Congress' decision to allow union-security agreements *at all* reflects its concern that . . . the

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[11]These "benefits" are the presumably enhanced terms and conditions of employment that flow from collective bargaining, rather than the accouterments of full union membership such as attending organization meetings or running for organization office.

parties to a collective bargaining agreement be allowed to provide that there be no employees who are getting the benefits of union representation without paying for them.'" *Id.*, quoting with emphasis added, *Oil Workers v. Mobil Oil Corp.*, 426 U.S. 407, 416 (1976). In this regard, the legislative history is unambiguous. As Senator Taft told his colleagues, "[W]hat we do, in effect, [in passing § 8(a)(3)] is to say that no one can get a free ride in such a shop. That meets one of the arguments for the union shop. The employee has to pay the union dues." *93 Cong. Rec. 3953* (cited in *Beck*, 487 U.S. at 748 n. 5).

These "financial core" dues, of course, are limited to an amount reflecting the costs of collective bargaining, grievance processing and other representational duties and cannot include any assessment for political activities or other functions. *Beck*, 487 U.S. at 745.

Through its careful analysis of the legislative history of § 8(a)(3), *Beck* demonstrates that an employee benefiting from a union's bargaining efforts must pay dues equivalent to his or her share of those costs. This is true whether the employee is a full member or a "financial core" member. It is also true whether the employee has suffered union discipline curtailing his or her full membership rights. Whatever the status of those full membership rights, the employee, as a constituent of the bargaining unit for which the union acts, shares in the

benefits conferred through those actions. And, as *Beck* makes clear, the employee must financially contribute to defraying the costs of that representation effort. *Id.* at 753 n. 8 ("[T]he costs of representation must be borne equally by all those who benefit[.]")[12]

In effect, *Beck* renders the *McGraw Edison* line of cases little more than a legal dead-letter. It is no coincidence that *Machinists District 94*, the last decision in that line, was issued about a year before this Court's opinion in *Beck* and almost nine years ago.[13]

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[12]This is further reflected in the requirement of § 8(a)(3) that dues be "uniform." Therefore, a union could not levy disproportionately high dues on non-members or dissident members and then seek termination of their employment pursuant to a union-security agreement if they refused to pay the discriminatory excess. *Beck*, 487 U.S. at 753 n. 8. It necessarily follows that a disgruntled union member cannot unilaterally quit paying his financial core dues -- thus according himself non-uniform and, in actuality, nonexistent dues -- while hoping to avoid discharge under an agency shop agreement.

[13]The *Beck* decision effectively wrought the legal equivalent of extinction for *McGraw Edison* and its descendants. The only issue that survived *Beck* appears to be whether a disciplined member who declines to resign from the union must continue to pay full dues or merely core financial dues. Certainly, *Beck* read in conjunction with *McGraw Edison* would seem to counsel that a member who has been suspended or expelled need only pay the latter. This

In sum, *Beck* teaches that a union member who believes his membership rights have been wrongfully suspended, extinguished or otherwise substantially impaired must continue to pay "core financial" dues. A member who refuses to do so -- like all of those in the *McGraw Edison* cases -- may face termination of his or her employment pursuant to an agency shop agreement. The termination would be proper, since it necessarily would arise from the member's deliberate and legally impermissible decision to cease paying all dues, rather than from the underlying grounds for which he or she was disciplined in the first place. That is, but for the member's refusal to pay any dues whatsoever, the union would have no basis to seek enforcement of an agency-shop agreement with the employer. The reasons the member has chosen to pay no dues are essentially irrelevant in light of the congressional intent, as carefully parsed in *Beck*, to eliminate free-ridership for anyone represented by a labor organization. In sum, union members may not unilaterally quit paying dues as a self-help remedy for real or

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case presents neither that question nor the related question of what dues a member must pay after his intra-union rights have been impaired, rather than terminated, as a disciplinary measure. Petitioner refused to any dues at all, pet. app. at 22a, and none of the parties raised this issue below, pet. app. at 26a n. 9. This Court typically refuses to entertain questions "not pressed or passed upon below." *Williams*, 504 U.S. at 41.

imagined transgressions of their labor organizations.

This is not to say, however, that a member who believes he has been wrongfully disciplined by the union to which he belongs is without recourse or remedy in challenging that discipline. For example, depending on the particular facts, the member may file unfair labor practice charges with the Board if he or she believes the union has interfered with any protected § 7 rights. He or she may seek relief pursuant to the Labor Management Report and Disclosure Act, 29 U.S.C. § 401 et seq., which, *inter alia*, protects against impairment of intra-union free speech rights and procedurally improper disciplinary actions. The member could bring suit alleging the union has breached its duty of fair representation, *see Vaca v. Sipes*, 386 U.S. 171, 177-180 (1967), or has violated the terms of its governing constitution, *see Wooddell v. Electrical Workers*, 502 U.S. 93, 98-103 (1991).

III. This Decision Creates No Inter-Circuit Split

Petitioner next contends certiorari should be granted because the Court of Appeals decision here conflicts with two earlier circuit rulings, *Communications Workers Local 1104*, 520 F.2d at 420; *NLRB v. Pipefitters Union Local No. 120*, 719 F.2d 178, 183-84 (6th Cir. 1983). As noted earlier, this is a wholly contrived conflict and, as such, affords no basis for review here.

In *Communications Workers Local 1104*, one case in the *McGraw Edison* line, the Second Circuit enforced a Board order essentially allowing a bargaining unit employee excluded from the union for supporting a rival organization to cease paying all dues without facing loss of employment pursuant to a valid union-security agreement. The court recognized its ruling would create a group of free riders consisting of "those who . . . are lawfully excluded from the union for activity that, though protected by § 7, is disloyal to the union." *Communications Workers Local 1104*, 520 F.2d at 420. The court presumed this result was a necessary by-product of the elimination of "compulsory unionism" or closed-shop agreements effectuated through the passage of § 8(a)(3). *Id.* In arriving at its conclusions, the court did not review the legislative history and, indeed, expressly noted an apparent "absen[ce of] explicit legislative instruction" on how to reconcile the correlative problems of eliminating closed shops and preventing free riders. *Id.*

Some 13 years later, this Court provided that guidance in *Beck* with its studied review and analysis of the congressional intent behind the adoption of § 8(a)(3). That analysis, of course, reveals a Congress firmly set against both forced union membership and free ridership by non-members. As *Beck* explains, those concerns are resolved by requiring all employees within a bargaining unit to pay core

financial dues to the labor organization but demanding full membership of none of them.

Had the Second Circuit the benefit of *Beck* when it considered *Communications Workers Local 1104*, the result necessarily would have been different. Thus, there is no genuine conflict between the Court of Appeals decision here and that of the Second Circuit, given an intervening and controlling opinion of this Court mandating an outcome consistent with that reached below in this case.[14]

In fact, the result in *Communications Workers Local 1104* demonstrates one of the principal harms that would occur if Petitioner's position here were accepted. Any union member subjected to intra-union discipline could cite that action as a reason for withholding payment of all dues, thereby, becoming a free rider. This would encourage members who want to avoid paying dues to engage in misconduct inviting union sanctions. Once disciplined for that misconduct, those members would be placed in a "better" position with respect to their dues obligations than either full members or

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[14]Even if *Communications Workers Local 1104* were a viable statement of the law post-*Beck*, its conclusion is distinguishable factually from that reached in this case. The Second Circuit would have bestowed free-rider status on those union members who had engaged in protected § 7 activity. *Communications Workers Local 1104*, 520 F.2d at 420. Here, Petitioner's conduct was not within the protections of § 7.

financial core members. Such a result typifies a scenario violating the legal axiom that a person should not benefit from his own wrongs. Likewise, it would seem to beg dissatisfied union members to claim any and all manner of union activity as improper discipline or other misfeasance so as to avoid their dues obligations.

Confronted with such a doctrine, a union likely would refrain from enforcing its *bona fide* internal rules in many instances. As the Court of Appeals suggested here, this would truly create a Hobson's choice in which the union must either forego discipline of members whose conduct was plainly destructive of the organization's collective bargaining position or impose discipline and, thereby, create a class of free riders. Pet. App. at 7a-8a. This outcome is inconsistent with the purposes behind § 8(a)(3). Moreover, it would effectively read out of the Act that portion of § 8(b)(1)(A) providing that a union shall not be impaired in prescribing and enforcing its internal membership rules. And it would insinuate the government far more deeply into matters of internal union operation than Congress ever intended. *See Scofield*, 394 U.S. at 428 (Congress did not intend to intrude upon "the internal affairs of unions" in passing the Taft-Hartley Act); *Wirtz v. Local 153, G.B.B.A.*, 389 U.S. 463, 471 (1968) (LMRDA consistent with "general congressional policy to allow unions great latitude in resolving their own internal controversies . . . .").

Petitioner's reliance on the Sixth Circuit decision in *Pipefitters Union Local No. 120* to create a circuit split is equally unavailing. In that case, the union promised membership to two employees upon completion of their probationary work periods. They completed their probation and were otherwise fully qualified for and apparently desirous of accepting union membership. The union, however, reneged on its promise of membership and, yet, attempted to make the pair pay full union dues to avoid termination of employment under a union-shop agreement. Thus, the union failed to make membership available to the individuals on the same terms and conditions applicable to others and attempted to coerce and deter them in their efforts to join the union. The factual scenario presented there bears little similarity to that here, since Petitioner had been afforded full union membership. Thus, the results are not in conflict either.

In making this argument, Petitioner also grossly misuses *Pattern Makers*, 473 U.S. 95, in an effort to bolster his claim that he should be entitled to free-rider status as part and parcel of Congress' aim of fostering "voluntary unionism." Pet. at 17-18. In *Pattern Makers*, this Court held that voluntary unionism would be thwarted if members could not freely resign from labor organizations and, in doing so, avoid internal discipline. *Id.* at 107 ("[T]he Board was justified in concluding that by restricting the right of employees to resign, [the union's rule] impairs the policy of

voluntary unionism."). Here, of course, Petitioner could have resigned and avoided the union sanctions. But he chose not to and instead sought to stop paying dues -- something he certainly could not have done as a resignee, since he would have been obligated to make a core financial contribution. The *Pattern Makers* decision in no way endorses a self-help refusal to pay all dues as a component of "voluntary unionism" or on any other grounds.

IV. The Board Correctly Found Gilbert Exercised No Protected § 7 Rights, and The Issue Fails to Present An Important Question

The Board recognized that Petitioner's conduct as Local D-100 president in pursuing a company proposal aimed at eviscerating the union's bargaining unit at the plant was not protected under § 7. This is precisely the sort of statutory interpretation entrusted to the agency's expertise in "applying the general provisions of the Act to the complexities of industrial life." *NLRB v. Erie Resistor Co.*, 373 U.S. 221, 236 (1963). In *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 829-30 (1984), this Court expressly noted that the Board's interpretation of what conduct falls within § 7 must be accorded deference and upheld if reasonable.

There is little question that cutting the size of the bargaining unit in half would have had an extraordinarily adverse impact on the union's ability to operate as an effective representative of its remaining

members. Pet. App. at 52a. Such collective representation of workers for improved wages, hours and other working conditions rests at the very heart of this country's "national labor policy." *Allis-Chalmers Mfg.*, 388 U.S. at 180. This Court has held that a union must be allowed "to protect against erosion [of] its status under that policy through reasonable discipline of members who violate rules and regulations governing membership." *Id.* at 181. Accordingly, a union can lawfully discipline strikebreakers. *Id. See also Sheet Metal Workers Local 22 (Miller Sheet Metal)*, 296 NLRB 1146 (1989) (Local acts lawfully in disciplining member for dual unionism); *Meat Cutters (S & M Grocers)*, 237 NLRB 1159 (1978) (union threat to discipline members who fail to support organizing drive does not violate § 8(b)(1)). Petitioner's conduct here, which would have led to the decimation of the bargaining unit, is at least as destructive as crossing a picket line. Thus, even if his actions fell within the scope of § 7, Petitioner properly could have been subjected to internal union discipline, since that discipline would not impair "overriding" labor policies but, rather, would further their objectives. *See Scofield*, 394 U.S. at 429. Moreover, Petitioner could have resigned his membership and avoided any internal discipline whatsoever. He did not.

None of the authority Petitioner cites so much as hints his conduct falls within § 7 or should be protected. *See Helton v. NLRB*, 656 F.2d 883 (D.C. Cir. 1981) (union

member illegally coerced for posting literature from intra-union watchdog group on union bulletin board); *Hendricks Cty. Rural Elec., Etc. v. NLRB*, 603 F.2d 25, 27 (7th Cir. 1979) (employer acts illegally if it disciplines employee for circulating petition seeking reinstatement of fired co-worker); *Laborers Local 806*, 295 NLRB 941, 944 (1989) (Local improperly coerced members who, *inter alia*, filed Board charges alleging discriminatory job referral system); *Roadway Express, Inc.*, 108 NLRB 874 (1954), *enforced sub nom. Teamsters Local 823 v. NLRB*, 227 F.2d 439 (10th Cir. 1955) (Local unlawfully threatened members after they made written complaint to International).

Ultimately, whether Petitioner's conduct was protected has no bearing on the outcome below. Even if it were protected, the reason the union sought to invoke the union-security clause was Petitioner's refusal to pay any dues whatsoever. As discussed, Petitioner's improper self-help precipitated resort to the union-security clause. Petitioner had no legal right to stop paying all dues regardless of the propriety of the discipline. Accordingly, a decision in Petitioner's favor on the merits of this question would not change the ultimate determination below. This Court should be reticent to grant certiorari on a question so narrow and remote that it will not even affect the legal rights of the parties to the case.

Finally, determining whether specific conduct is protected often turns on the particular factual circumstances. *See, e.g., Reef Industries, Inc. v. NLRB*, 952 F.2d 830, 837 (5th Cir. 1991); *Roadmaster Corp. v. NLRB*, 874 F.2d 448, 452 (7th Cir. 1989). The issue tends to be inextricably fact-bound, and any determination of this Court would be similarly limited to this case alone. Absent some gross confusion or split among the circuit courts in dealing with the type of factual situation presented here (and there appears to be none), this Court should decline review on certiorari.

V. Conclusion

For the reasons stated here, the petition for writ of certiorari should be denied in its entirety.

Respectfully submitted,

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Supreme Court, U.S.
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No. 95-744

In the Supreme Court of the United States

OCTOBER TERM, 1995

JAMES GILBERT, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the National Labor Relations Board reasonably concluded that the union did not violate Section 8(b)(1)(A) of the National Labor Relations Act, 29 U.S.C. 158(b)(1)(A), by stating its intention to cause the discharge of a union member pursuant to a valid union-security agreement if he ceased paying dues after he had been subjected to lawful union disciplinary action.

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 56 F.3d 1438. The decision and order of the National Labor Relations Board and the decision of the administrative law judge (Pet. App. 19a-55a) are reported at 312 N.L.R.B. 218.

JURISDICTION

The judgment of the court of appeals was entered on June 16, 1995. A petition for rehearing was denied on August 16, 1995. Pet. App. 56a-57a. The petition for a writ of certiorari was filed on November 9, 1995. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Section 8(b)(1)(A) of the National Labor Relations Act (NLRA or Act), 29 U.S.C. 158(b)(1)(A), makes it unlawful for a union "to restrain or coerce * * * employees in the exercise of the rights guaranteed in [Section 7 of the Act, 29 U.S.C. 157]." Section 7, in turn, gives employees the right to engage in a range of activities in support of collective bargaining, and also gives them the right to refrain from such activities "except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in [Section 8(a)(3), 29 U.S.C. 158(a)(3)]." A proviso to Section 8(b)(1)(A) adds that the Section "shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein." 29 U.S.C. 158(b)(1)(A). That proviso permits a union to impose internal discipline on a member for violating a union rule where the rule "reflects a legitimate union interest, impairs no policy Congress has imbedded in the labor laws, and is reasonably enforced against union members who are free to leave the union and escape the rule." *Scofield* v. *NLRB*, 394 U.S. 423, 430 (1969).

Section 8(a)(3) of the NLRA, 29 U.S.C. 158(a)(3), makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment * * * to encourage or discourage membership in any labor organization," but that Section contains two provisos authorizing union-security agreements between employers and unions, and limiting the

circumstances in which such agreements may be imposed. The first proviso authorizes a union and an employer to require as a condition of continued employment that all employees in the bargaining unit establish and maintain membership in the union. The second proviso prohibits the discharge of an employee pursuant to a union-security agreement where (A) "such membership was not available to the employee on the same terms and conditions generally applicable to other members," or (B) "membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership." *Ibid.*

b. Before 1984, Local 100 of the Cement, Lime, Gypsum and Allied Workers International Union (Cement Workers) represented a unit of employees at the Kaiser Cement Corporation's facility in Permanente, California. In April 1984, the Cement Workers merged with the International Brotherhood of Boilermakers (Union), and Local 100 of the Cement Workers became Local D-100 of the Boilermakers (Local). Petitioner, a long-time Kaiser employee, had been president of Local 100 since 1977, and remained president of the Local after the merger. Although petitioner and others in Local 100 had not favored the merger, they took no action to oppose the Union until 1986. Pet. App. 20a, 29a.

On September 16, 1986, dissatisfied with the Union's termination of four union representatives who had been long-term officials of the Cement Workers, petitioner wrote a letter to the president of the international union asking that the termination of one of those representatives be reconsidered. The president refused the request. In July 1988, peti-

tioner prepared and circulated a petition requesting a Board election so that the bargaining unit employees could choose a new international union to represent them. All but one of the employees in the unit signed the disaffiliation petition, but it was never filed with the NLRB. Pet. App. 5a, 20a-21a, 29a-31a.

On September 22, 1988, at a meeting of Local D-100's membership, petitioner presented a "Letter of Understanding" written by the company, which proposed to convert the jobs of 17 unit employees, including petitioner, to salaried supervisory positions, thereby removing them from the collective bargaining unit and representation by the local. While petitioner took no formal position on the proposal, he described the proposal's benefits as the company had represented them. Local D-100 Financial Secretary Donald Hall attended the meeting, and also took no position on the proposal. Unit employee Arthur Rose, however, spoke in favor of it. The bargaining unit employees rejected the proposal by a vote of 23 to 11. About two weeks later, Joseph Gaxiola, a trustee of Local D-100, circulated a petition asking for the unit employees' view on a proposal to make all bargaining unit positions salaried, thereby eliminating the unit. Gaxiola supported the proposal, but again a majority of the unit employees opposed it. Pet. App. 5a-6a, 21a-22a, 32a-37a.

In October 1988, a bargaining unit employee filed internal Union charges against petitioner, Hall, Rose, and Gaxiola, alleging that they had engaged in activities in support of removing persons from the bargaining unit, in violation of the Union's constitution. After a hearing before a representative of the International, the Union found the four employees guilty of all charges and barred them from holding

any Union office or attending any Union meetings, except those called to vote on the ratification of contracts directly affecting them. Those penalties were applied to petitioner for five years, Hall for three years, and Gaxiola and Rose for two years. Pet. App. 6a, 22a, 37a-40a.

In April 1989, in a joint letter to the Union president, the four disciplined employees asserted that they had been effectively suspended from the Union and therefore no longer were obligated to pay union dues. In a letter dated May 22, 1989, the president responded that the four employees had not been suspended and must continue to pay dues in order to remain members of the Union in good standing. In a subsequent letter dated July 20, 1989, the disciplined employees asked what penalties might be imposed on them if they stopped paying dues. The president replied that the Union's contract with the company contained a union-security clause and that, if the four employees ceased paying dues, the Union would so notify the company, and the employees would no longer be permitted to work at the plant. Nevertheless, petitioner stopped paying his dues for two months. He resumed payment, however, when the company notified him that the Union had requested his discharge under the union-security agreement. Petitioner thus was not dismissed from his employment. Pet. App. 6a, 22a-23a, 40a-45a.

2. a. On October 6, 1989, petitioner filed with the NLRB an unfair labor practice charge against the Union under Section 8(b)(1)(A) of the NLRA. On December 14, 1989, the NLRB's General Counsel issued a complaint against the Union. An administrative law judge (ALJ) recommended that the General Counsel's complaint be dismissed. Pet. App.

27a-55a. The ALJ rejected the General Counsel's contention that the Union's discipline of petitioner and the three other employees was unlawful under Section 8(b)(1)(A). He concluded that the Union had the right to protect itself against the activities of the four disciplined employees, which could have resulted in the erosion or elimination of the bargaining unit that the Union represented. He found that the Union's constitution, barring such erosion of its status as collective bargaining representative, had been reasonably enforced against the four employees, who at all times were free to leave the Union to escape those rules (while continuing to pay dues as required by the union-security clause), but had not done so. *Id.* at 48a-53a.

The ALJ next held that the Union did not violate the NLRA by threatening to invoke the union-security agreement. The Union's statement of its intention to invoke the agreement was lawful, he concluded, because the employees had not been disciplined for the exercise of any rights protected by Section 7 of the Act, 29 U.S.C. 157. Pet. App. 53a. Section 7 gives employees the right to engage in and to refrain from activities in support of collective bargaining, except to the extent that any such right may be affected by a union-security agreement. Because no Section 7 rights were involved, the ALJ distinguished this case from cases relied on by the General Counsel, in which the Board had held that a union violated Section 8(b)(1)(A) of the Act by threatening to invoke a union-security clause against employees who had been disciplined in various ways for the exercise of certain Section 7 rights. Pet. App. 53a (citing *Local 4186, United Steelworkers (McGraw Edison Co.)*, 181 N.L.R.B. 992 (1970)).

Finally, the ALJ rejected the General Counsel's alternative argument that, even if the activities for which the employees were disciplined were not protected, their membership rights were so substantially reduced that enforcement of the union-security clause against them became unlawful. That argument, the ALJ reasoned, would present the Union with the "Hobson's choice" of either forgoing its right to discipline members under the proviso to Section 8(b)(1)(A),[1] thereby rendering that proviso a nullity, or relinquishing its right to enforce the provisions of a valid union-security agreement and facing self-destruction through loss of the dues of disciplined members. Pet. App. 54a. The ALJ added that the General Counsel's position, if implemented, would induce any members who are unwilling to pay dues in the first place for financial or philosophical reasons to subject themselves to union discipline "so they would be 'punished,' by not having to pay union dues, although they would continue their employment." *Ibid.*

b. The NLRB adopted the ALJ's recommendation. Pet. App. 19a-27a. The Board held that the Union had lawfully disciplined petitioner and the other employees. The Board noted that there are limitations on a union's right to discipline members, such as the requirement that employee-members must always remain free to resign their membership and thereby escape union rules and discipline. But the

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[1] The proviso to Section 8(b)(1)(A) provides that the prohibitions of that Section "shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein." 29 U.S.C. 158(b)(1)(A).

Board stated that employees who "have opted for continued membership * * * cannot be heard to complain if the union enforces the rules of membership." *Id.* at 25a. The Board further noted that a union may not adopt a rule that "impairs a policy that Congress has embedded in the labor laws," such as a rule that would fine a member for exercising the "fundamental" Section 7 right of seeking access to the Board (by filing a petition or charge). *Ibid.* In this case, however, the Board found that petitioner and the other disciplined members were at all times free to resign their membership, but chose not to do so. Thus, the Union was authorized to discipline them, and "[t]he fact that the Union chose to discipline them by impairing their membership, rather than by expelling them or fining them, does not transform lawful discipline into unlawful discipline." *Id.* at 25a-26a. The disciplined members' actions implicated no fundamental Section 7 policy. *Ibid.*

Finally, the Board held that the Union's enforcement of the union-security agreement against the disciplined employees did not violate the NLRA. The Board stated that, "[b]ecause the [Union's] discipline of these members did not violate the Act, the members continued, as unit employees, to be required under the union-security agreement to satisfy the sole obligation a union may enforce under a union-security provision: the tendering of uniform initiation fees (if any) and dues." Pet. App. 26a (internal quotation marks omitted). The Board thus concluded that the Union "did not violate Section 8(b)(1)(A) of the Act by threatening to invoke the union-security clause against petitioner and the three other employee-members if they ceased paying dues after the [Union] disciplined them." *Ibid.* The Board emphasized that

the Union continued to have a duty of fair representation toward all employees, including those it had subjected to discipline. *Ibid.*

3. The court of appeals affirmed the Board's decision. Pet. App. 1a-18a. The court rejected petitioner's contention that the Union's threat to invoke the union-security agreement unless he paid his union dues was impermissible under the second proviso to Section 8(a)(3) of the Act, 29 U.S.C. 158(a)(3).[2] The court held that the mere fact that petitioner was deprived of certain membership privileges for violating valid Union rules that applied uniformly to every other member does not show that membership was not "available" to him on the same terms and conditions as other employees, within the meaning of the first condition to the proviso: "Membership was offered to [petitioner] on the same terms as it was to other employees. This membership, however, included both rights and obligations. When [petitioner] freely chose to violate his obligations, he was disciplined just as any other member would have been." Pet. App. 10a. Nor, in the court's view, did the Union's impairment of petitioner's membership rights place him within the second condition to the

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[2] The second proviso to Section 8(a)(3) states:

> That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

proviso. For, "even accepting [petitioner's] characterization that his membership rights were 'substantially impaired' for reasons other than nonpayment of dues, the fact remains that his Union membership was never 'denied' or 'terminated.'" *Id.* at 11a.

The court also rejected petitioner's contention that, even if the result reached by the Board were permissible under Section 8(a)(3), the Board's decision in this case was arbitrary and capricious, because the Board departed from its own precedent without adequate explanation. The court found that all but one of the prior cases relied on by petitioner are "sufficiently distinguishable" from the case at hand, and that, with respect to the one case that is arguably on point, *International Ass'n of Machinists, District Lodge 94 (McDonnell Douglas Corp.)*, 283 N.L.R.B. 881 (1987), "the Board's decision here provided adequate reasoning for and notice of the Board's departure from that case." Pet. App. 14a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with decisions of this Court or any other court of appeals. This Court's review is not warranted.

In a holding affirmed by the court of appeals and not challenged by petitioner, the Board found lawful the Union discipline of petitioner that underlies his challenge to the requirement that he continue to pay dues. Pet. App. 25a. The issue here is whether the Board reasonably concluded that petitioner remained obligated, following that lawful discipline, to pay dues under the union-security agreement between the Union and company, so that the Union's threat to

seek petitioner's discharge for failure to comply with that obligation did not violate Section 8(b)(1)(A) of the NLRA, 29 U.S.C. 158(b)(1)(A).

1. a. Petitioner contends (Pet. 7-15) that the court of appeals decided an important issue that this Court left open in *NLRB* v. *General Motors Corp.*, 373 U.S. 734 (1963), in a way that he asserts is incompatible with the NLRA's terms and the Board's consistent prior interpretation of the Act. There is no merit to that contention.

In *General Motors*, the Court stated that, under the second proviso to Section 8(a)(3), "[i]t is permissible to condition employment upon [union] membership, but membership, insofar as it has significance to employment rights, may in turn be conditioned only upon payment of fees and dues." 373 U.S. at 742. It therefore upheld, as valid under the Act, an "agency shop arrangement" which "places the option of membership in the employee while still requiring the same monetary support as does the union shop." *Id.* at 744. The Court left "for another case" the "significance of desired, but unavailable union membership, or the benefits of membership, in terms of permissible [Section] 8(a)(3) security contracts." *Id.* at 745 n.12.

This case does not present the issue referred to in *General Motors*, however, because, like the agency shop arrangement in that case, "there is no closed-union aspect to the present proposal by the union." 373 U.S. at 745 n.12. The Court was referring to a situation in which an employee is excluded from the union, but is nonetheless required to contribute monetary support to the union. Petitioner was not refused membership or the benefits of membership; the union-security agreement in this case left him the option to become a full union member or merely a

dues payer, and he elected full union membership. As a full union member, he subjected himself to reasonable union discipline for violating valid union rules. To conclude that such discipline relieved petitioner of his dues-paying obligation under the union-security clause would place him in a better position than that of an employee who had opted only to give monetary support to the union.

Even if this case did present the issue left open in *General Motors*, review by this Court would not be warranted because, as the court of appeals held, the Board's resolution of the issue is reasonable and compatible with the Act's terms and policies. The court correctly held that the second proviso of Section 8(a)(3) was not violated, because the union subjected petitioner to the same discipline it would have imposed on any other member for the same violation of union rules. Pet. App. 10a-11a. In those circumstances, the court concluded, "the only reasonable conclusion is the one reached by the Board—membership in the Union was 'available' to [petitioner] on the same terms and conditions as it was to other employees." *Id.* at 11a.[3]

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[3] Petitioner contends (Pet. 13) that the court of appeals' holding "misses the point: once membership is substantially impaired it is *no longer* 'available to the employee on the same terms and conditions generally applicable to other members.' " However, the determination whether membership was "available" to an employee on equal terms should be made as of the time the employee applies for membership in the union, and not, as petitioner contends, after the union has lawfully disciplined him for violating its rules. Otherwise, any employee who was admitted to the union and later subjected to lawful discipline short of expulsion for breaking its rules could stop paying dues, and thus become a "free rider," simply by asserting that membership was no longer available to him

The court of appeals further correctly held that petitioner's membership rights were not "denied or terminated" for a reason other than nonpayment of dues within the meaning of Section 8(a)(3)'s second proviso. As the court of appeals observed, "even accepting [petitioner's] characterization that his membership rights were 'substantially impaired' for reasons other than nonpayment of dues, the fact remains that his Union membership was never 'denied' or 'terminated.'" Pet. App. 11a. The court added: "[Petitioner] was specifically told by the Union following his discipline that his membership had not been suspended, and [petitioner] chose not to resign his membership. [Petitioner] thus remained at all relevant times a full member of the Union," and the "discipline imposed on him was merely an *incident of that continued membership* in the Union." *Ibid.*

b. Petitioner contends (Pet. 9-12) that the Board's decision here overruled, without explanation, a long-standing prior construction of the Act. Petitioner relies on "a line of six Board decisions beginning with *McGraw Edison* [*Local 4186, United Steelworkers*, 181 N.L.R.B. 992 (1970)], and culminating with *Machinists District 94 (McDonnell Douglas)*, 283 N.L.R.B. 881 (1987)." Pet. App. 13a (parallel citation omitted). The court of appeals correctly distinguished all of those cases.

In *McGraw Edison*, the union disciplined an employee for filing a decertification petition with the Board, and then threatened to invoke a union-security clause to enforce his payment of dues. The Board held

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on equal terms. It is elementary that the Act's provisions should be read as mutually compatible rather than as self-contradictory.

that the union's threat violated Section 8(b)(1)(A), because imposition of discipline for petitioning the Board is "a serious restraint upon access to Board processes." 181 N.L.R.B. at 992; see *Scofield* v. *NLRB*, 394 U.S. 423, 430 (1969). As the Board explained here, access to the Board is a "fundamental" Section 7 right upon which all other rights under the Act depend. Pet. App. 25a n.7. By contrast, the conduct for which petitioner was disciplined did not involve the exercise of a fundamental Section 7 right, nor did the discipline impair any other statutory policy. In short, the discipline here was lawful.

In *McDonnell Douglas*, several employees resigned from the union, stopped paying dues, and returned to work during a strike. The union disciplined them by forbidding them from holding union office for five years, and threatened to invoke a union-security agreement based on their nonpayment of dues. 283 N.L.R.B. at 884-885, 892-893. Because a union has no right to discipline members after they have resigned from the union (see *Pattern Makers' League* v. *NLRB*, 473 U.S. 95 (1985)), the Board held that the union's discipline of the employees was unlawful. Here, by contrast, petitioner elected to remain a member of the Union, and thus was properly subject to Union discipline for violating a valid Union rule.[4]

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[4] The court of appeals also found the other four of the post-*McGraw Edison* cases relied on by petitioner to be "clearly distinguishable" from this case. "In each of those four cases," the court observed, "the union sought to enforce a union-security clause on employees who had either been *denied* membership, *expelled* from membership, or fully *suspended* from membership for engaging in various section 7 activities." Pet. App. 15a (citations omitted). The unions' actions in those cases thus "fell within the literal language of section 8(a)(3)'s

2. a. Contrary to petitioner's contention (Pet. 15, 17-18), the court of appeals' decision is not inconsistent with *Pattern Makers'*, *supra*, and *Communications Workers* v. *Beck*, 487 U.S. 735 (1988). *Pattern Makers'* held that the policy of voluntary unionism embodied in the Act permits employees freely to resign from the union and precludes a union from disciplining an employee for an infraction of union rules committed after he has resigned. 473 U.S. at 115-116. Petitioner, however, elected to remain a member of the Union and thus was properly subjected to discipline for violating valid Union rules.

In *Beck*, the Court held that the union-security provisos to Section 8(a)(3) do not obligate objecting dues-paying nonmember employees "to support union activities beyond those germane to collective bargaining, contract administration, and grievance adjustment." 487 U.S. at 738, 745. *Beck* is inapposite here because petitioner has elected to become and remain a member of the Union, and has not objected that his dues payments would be used to support non-germane union activities. See Pet. App. 26a n.9. Indeed, *Beck* recognized that Congress's purpose in allowing union-security agreements was "to provide that there be no employees who are getting the benefits of union representation without paying for them." 487 U.S. at 750. To adopt petitioner's interpretation of the second proviso would, as the court of appeals explained,

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second proviso * * * because the unions had invoked or threatened to invoke union-security agreements against employees whose membership had been 'denied' or 'terminated' for reasons other than failure to pay dues." *Id.* at 16a n.4.

negate Congress's purpose. Pet. App. 12a; see also *id.* at 54a.

b. Decisions of other circuits (see Pet. 15-17) do not conflict with the decision of the court of appeals. In both *Local 1104, Communications Workers* v. *NLRB*, 520 F.2d 411 (2d Cir. 1975), cert. denied, 423 U.S. 1051 (1976), and *NLRB* v. *Pipefitters Union Local No. 120*, 719 F.2d 178 (6th Cir. 1983), the courts enforced Board decisions holding that unions had violated Section 8(b)(1)(A) by enforcing union-security agreements against employees who were denied membership as discipline for having supported a rival union (*Communications Workers*), or for arbitrary reasons (*Pipefitters*). The unions' actions in those cases thus fell within the plain terms of Section 8(a)(3)'s second proviso—the employees' membership had been "denied" or "terminated" for reasons other than failure to pay dues. See note 4, *supra*. By contrast, although petitioner's membership rights were restricted for a period, his membership in the Union was neither denied nor terminated.

3. Finally, there is no merit to petitioner's contention (Pet. 18-21) that the decision of the court of appeals conflicts with decisions of this and other courts holding that Section 7 of the NLRA protects dissident intra-union activities. None of the cases relied on by petitioner involved the kind of situation at issue here, in which a union member was disciplined for violating a legitimate union rule that is consistent with the policies that "Congress has imbedded in the labor laws." *Scofield*, 394 U.S. at 430. In such a situation, even if the member's conduct might be protected by Section 7, the proviso to Section 8(b)(1)(A) permits the union to discipline the

member for violating its rule, as long as the member was free, as was petitioner, to leave the union and escape the rule. See *Scofield*, 394 U.S. at 430; Pet. App. 24a-25a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1996

Supreme Court, U.S.
FILED
MAR 8 1996

No. 95-744

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

JAMES GILBERT,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

and

INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS, AFL-CIO

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITIONER'S REPLY BRIEF

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ARGUMENT

I. This Case Squarely Presents the Important Question Reserved by This Court in *NLRB v. General Motors*

In *NLRB v. General Motors Corp.*, 373 U.S. 734, 745 n.12 (1963), this Court expressly left open whether an employee denied full union membership for a reason other than nonpayment of dues can be discharged if he then does not pay dues: "the significance of desired, but unavailable, union membership, or the benefits of membership, in terms of permissible § 8(a)(3) security contracts, we leave for another case." Respondents' arguments that this case does not present that question are unavailing.

Respondent International Brotherhood of Boilermakers ("Boilermakers") attempts to distinguish this case by misstating the question reserved in *General Motors* as whether "an agency shop agreement ***that by its terms*** barred certain employees from full union membership would comport with § 8(a)(3)" of the National Labor Relations Act ("Act" or "NLRA"), 29 U.S.C. § 158(a)(3) (1988). Boilermakers' Opp'n at 11 (emphasis added). However, the question left open by the Court was not limited to the facial validity of agency shop agreements.[1] Section 8(a)(3)'s limits on the union requirements that may be imposed on employees as a condition of employment can be violated by either the terms of agreements ***or*** the practices of unions and employers in enforcing them. *See, e.g., Communications Workers Local 1104*, 520 F.2d 411, 417-20 (2d Cir. 1975), *cert. denied*, 423 U.S. 1051 (1976); *Steelworkers Local 4186 (McGraw Edison)*, 181 N.L.R.B. 992, 992, 994-96 (1970).

Respondent National Labor Relations Board ("Board" or "NLRB") argues that this case does not present the question reserved in *General Motors*, because, it says, Petitioner James Gilbert ("Gilbert") "was not refused membership or the benefits of membership." NLRB's Opp'n at 11. In fact, the Boilermakers refused Gilbert the most important benefits of membership when

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[1] Significantly, the Boilermakers do not quote *General Motors*' statement of the reserved question. That would have given the game away.

it disciplined him: the rights to attend union meetings, vote on the election of officers and most other matters, and hold office. Pet. App. B at 39a-40a. This denial of membership rights was so serious that Gilbert effectively was refused membership. *McGraw Edison* treated a similar substantial disciplinary impairment of membership as a ***denial*** of membership. *See* 181 N.L.R.B. at 994 & n.6; *see also Communications Workers Local 9509*, 193 N.L.R.B. 83, 84 (1971) (case involving expulsion is "analogous" to one involving significant impairment of membership rights).

The Board contends that "the determination whether membership was 'available' to an employee on equal terms should be made as of the time the employee applies for membership in the union, and not . . . after the union has lawfully disciplined him for violating its rules." NLRB's Opp'n at 12 n.3. However, section 8(a)(3)'s second proviso contains no time limit on its prohibition of discharge for failure to pay dues where "membership was not available to the employee on the same terms and conditions generally applicable to other members," 29 U.S.C. § 158(a)(3), 2d proviso, pt. (A) (1988). Consequently, *McGraw Edison*, 181 N.L.R.B. at 992 (emphasis added), held that "a labor organization violates Section 8(b)(1)(A)[, 29 U.S.C. § 158(b)(1)(A) (1988),] by invoking, or threatening to invoke, a lawful union-security clause to enforce payment of dues by ***a member*** whose membership has been significantly impaired because he filed a decertification petition."

The legislative history of the Taft-Hartley Act amending the NLRA also shows that section 8(a)(3)'s second proviso applies to both applicants for membership and members. Senator Taft explained that the proviso was added in committee, because "the committee felt" that a union enforcing a union-shop agreement "must accept as members all who apply for membership, and must accept them on the same terms as it applies to other members, ***and must permit them to remain in the union*** if they are willing to pay their dues." Subcomm. on Labor, Sen. Comm. on Labor & Pub. Welfare, *Legislative History of the Labor Management Relations Act, 1947*, at 1096 (1974) (emphasis added). Senator Taft also gave an example of when the proviso would apply to members: "That provision . . . takes care of cases

similar to one in New York in which 10 men were fired because the union made a rule that it would not permit anyone to continue in membership unless he was the son of a man already working in that plant and a member of that union." *Id.* at 1420.

II. The Decisions Below Did Overrule, and This Case Is Not Distinguishable from, the *McGraw Edison* Line of Cases

Respondents argue that this case is different from, and did not overrule, the "line of six Board decisions beginning with *McGraw Edison*, and culminating with *Machinists District 94 (McDonnell Douglas)*, 283 N.L.R.B. 881 (1987)," Pet. App. A at 13a (citation omitted). Boilermakers' Opp'n at 13-14; NLRB's Opp'n at 13-14. However, Respondents totally ignore *Transportation Workers Local 525 (Johnson Controls World Servs.)*, 317 N.L.R.B. 402 (1995), Pet. App. F at 64a. In *Transportation Workers Local 525*, the Board ***itself*** explicitly held that its decision here "overruled sub silentio" the *McGraw Edison* line of cases. *Id.* at 402 n.2, 404-07, Pet. App. F at 64a n.2, 73a-82a.

Moreover, this case is not distinguishable from *McGraw Edison* and its progeny:

- The rule of those cases is that "a union may not invoke a union-security clause of a collective-bargaining agreement against an employee whose full union membership has been significantly impaired due to the exercise of Section 7 rights." *Transportation Workers Local 525*, 317 N.L.R.B. at 405, Pet. App. F at 77a. That rule applies where, as here, membership is substantially impaired, but not denied, and the discipline itself is lawful. That was the case in *McGraw Edison* and its most recent progeny, *Machinists District 94*.

The Boilermakers falsely state that in *McGraw Edison* a member's "suspension constituted an unfair labor practice." Boilermakers' Opp'n at 16. The Board does not identify the discipline in *McGraw Edison*, but misleadingly implies that it was unlawful; the Board also falsely states that the impairment of membership rights in *Machinists District 94* was held unlawful. NLRB's Opp'n at 13-14. In fact, in *McGraw Edison*, the employee was not suspended from membership at the relevant

time. Moreover, the Board there assumed that the reduction in his membership rights itself was lawful,[2] but held that the union's "**insistence upon [his] continued payment of dues** during periods when his rights as a member were significantly reduced **constituted a continuing form of [unlawful] coercion**." 181 N.L.R.B. at 992 (emphasis added). Similarly, in *Machinists District 94*, 283 N.L.R.B. at 892-93 & n.44, the Board presumed that an impairment of membership rights was lawful,[3] but held that the union violated section 8(b)(1)(A) by insisting on the payment of dues while that discipline was in effect.

- The Boilermakers argue that "the *McGraw Edison* line of cases is irrelevant here, since the activities for which Petitioner was sanctioned enjoyed no § 7 protection." Boilermakers' Opp'n at 17.[4] Gilbert and the three other employees named in his unfair labor practice charge were disciplined for proposing, at a union meeting and in a petition, that their local agree to remove certain positions from their bargaining unit. Pet. App. A at 5a-6a; Pet. App. B at 50a. As we show in the Petition at 19-21 and *infra* pages 9-10, this was dissident "free speech" activity protected by section 7 of the NLRA, 29 U.S.C. § 157 (1988).

- The Board emphasizes that in *McGraw Edison* the employee was disciplined "for petitioning the Board." NLRB's Opp'n at 14. However, the *McGraw Edison* rule also applies where, as here,

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[2] It was. *See Machinists Lodge 66*, 182 N.L.R.B. 849, 850 (1970).

[3] The only discipline held unlawful in *Machinists District 94* was fines. *See* 283 N.L.R.B. at 881 & n.4. This distinction between lawful impairment of membership rights and unlawful fines for postresignation conduct is consistent with later precedent. *See, e.g., Food & Commercial Workers Local 81*, 284 N.L.R.B. 1084, 1085-86 (1987).

[4] The Boilermakers' Opposition at 17 confuses the separate issues of what § 7 right protects the conduct for which Gilbert was disciplined and what right is restrained by the union's insistence upon payment of dues while the discipline is in effect. The former is the right to self-organization, *see* Pet. at 19-21; the latter is the right to refrain from membership except to the extent that § 8(a)(3) permits enforcement of a compulsory unionism agreement, *see id.* at 7.

employees are disciplined for exercising a section 7 right that does not involve the Board's processes: "a labor organization violates Section 8(b)(1)(A) . . . by invoking a lawful union-security clause to enforce payment of dues where employees have been denied union membership for exercising a right (crossing a picket line during a strike) guaranteed by Section 7 of the Act." *Communications Workers Local 1104*, 211 N.L.R.B. 114, 117 (1974), *enforced*, 520 F.2d 411 (2d Cir. 1975), *cert. denied*, 423 U.S. 1051 (1976). This is true even if membership rights are substantially impaired, but not wholly denied. That was the case in *Machinists District 94*, 283 N.L.R.B. at 892. *See also Telephone Traffic Union*, 241 N.L.R.B. 826, 826 n.3 (1979) (quoting *Communications Workers Local 1104*, 211 N.L.R.B. at 116) (the *McGraw Edison* rule applies to "**all** situations 'where membership is denied **or impaired** because of employees' exercise of rights guaranteed them under Section 7 of the Act'") (emphasis added).

III. This Court's Decision in *Communications Workers v. Beck* Did Not Vitiate the *McGraw Edison* Rule

The Boilermakers contend that *Communications Workers v. Beck*, 487 U.S. 735 (1988), "renders the *McGraw Edison* line of cases little more than a legal dead-letter." Boilermakers' Opp'n at 20. The Board implies as much. *See* NLRB's Opp'n at 15-16. That is a wholly unwarranted misinterpretation of *Beck*.

The issue in *Beck* was whether the compulsory financial obligation sanctioned by section 8(a)(3) "includes the obligation to support union activities beyond those germane to collective bargaining, contract administration, and grievance adjustment." 487 U.S. at 745. It was not whether employees who are denied membership or significant rights of membership have any financial obligation at all. "It is, of course, contrary to all traditions of our jurisprudence to consider the law on [a] point conclusively resolved by broad language in cases where the issue was not presented or even envisioned." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 387 n.5 (1992).

Therefore, *Beck*, 487 U.S. at 750, did not render the second proviso to section 8(a)(3) a nullity when it quoted the comment in *Oil Workers v. Mobil Oil Corp.*, 426 U.S. 407, 416 (1976),

that "Congress' decision to allow union-security agreements at all reflects its concern that . . . the parties to a collective bargaining agreement be allowed to provide that there be no employees who are getting the benefits of union representation without paying for them." To the contrary, *Beck*, 487 U.S. at 744-45, cited the second proviso to section 8(a)(3) as one of the "limits § 8(a)(3) places on the negotiation and enforcement of union-security agreements." Thus, *Beck* recognized that there are circumstances under which employees who receive the benefits of union representation cannot be required to pay for them.[5]

As *Beck*, 487 U.S. at 755 (quoting *Legislative History*, *supra* p. 2, at 470) (emphasis added), said, Congress intended the Taft-Hartley Act "to provide ***only the most grudging*** authorization of [union-security] agreements, permitting 'union-shop agreement[s] only under ***limited*** and administratively burdensome conditions.'" The legislative history of the second proviso to section 8(a)(3) supports the *McGraw Edison* rule. According to Senator Taft, that proviso was added in committee because "the committee felt that if it permitted a union shop agreement,"

> then the union . . . must accept as members all who apply for membership, and must accept them on the same terms as it applies to other members, ***and must permit them to remain in the union if they are willing to pay their dues***. In other words, the position of the committee was this: ***Either we must have an open shop or we must have an open union***.

Legislative History, supra p. 2, at 1096 (emphasis added).

Senator Taft emphasized several other times that under his bill there must be either an "open shop" or an "open union." *Id.* at 1010, 1097, 1420. If full membership is not available to all on the same terms, or is denied for reasons other than nonpayment of dues, then the union is not "open" as to the employees whose membership is impaired or denied. Thus, Senator Taft's state-

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[5] Another such circumstance is during the first 30 days of employment. *See* 29 U.S.C. § 8(a)(3), 1st proviso (1988).

ments imply the *McGraw Edison* rule: for those employees, section 8(a)(3)'s second proviso requires an "open shop."

The Boilermakers complain that this presents it with "a Hobson's choice" of either not disciplining disloyal members or permitting so-called "free riders." Boilermakers' Opp'n at 25. That choice seldom arises. Usually, as here, the union can lawfully impose a court-collectible fine. If that is the only penalty, it can still lawfully collect compulsory dues, because it has neither denied nor substantially impaired membership.

A union cannot lawfully fine, but can lawfully expel, suspend, or impair membership rights only if an employee is disciplined for activity: (1) related to a decertification or deauthorization petition or election, *Machinists Lodge 113*, 207 N.L.R.B. 795, 797-98 (1973); or, (2) occurring after the employee resigns, *Food & Commercial Workers Local 81*, 284 N.L.R.B. 1084, 1085-86 (1987). Only in those limited circumstances must the union choose between discipline and dues. However, this choice is consistent with the Act's underlying "policy of voluntary unionism," *Pattern Makers v. NLRB*, 473 U.S. 95, 114 (1985). As *Communications Workers Local 1104*, 520 F.2d at 420 (emphasis added), held in approving the *McGraw Edison* rule:

> while our decision necessarily entails some inroads on a union's ability to protect itself from free riders, the invasion is not serious. ***A contrary decision would create far greater problems of compulsory unionism, the elimination of which is as much a part of national labor policy as is the competing goal of protecting unions from free riders.***[6]

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[6] The *McGraw Edison* rule does not "effectively read out of the Act that portion of § 8(b)(1)(A) providing that a union shall not be impaired in prescribing and enforcing its internal membership rules," Boilermakers' Opp'n at 25. That proviso must be read together with the general rule to which it is an exception, and with §§ 7 and 8(a)(3). Sections 8(b)(1) and 8(a)(3), with other sections of the Act, "form a web, of which § 8(b)(1)(A) is only a strand." *Scofield v. NLRB*, 394 U.S. 423, 428-29 (1969).

IV. The Boilermakers' Argument Demonstrates the Split Among the Circuits About the *McGraw Edison* Rule

Respondents assert that the Court of Appeals' decision in this case does not conflict with the decisions of the Second and Sixth Circuits in *Communications Workers Local 1104* and *NLRB v. Pipefitters Local 120*, 719 F.2d 178 (6th Cir. 1983). Boilermakers' Opp'n at 22-27; NLRB's Opp'n at 16. However, the Boilermakers unwittingly show the conflict.

The Boilermakers argue that no conflict exists between the Court of Appeals' decision here and *Communications Workers Local 1104*, because, they say, the intervening decision in *Beck* mandated the decision here and established that *Communications Workers Local 1104* was wrongly decided. Boilermakers' Opp'n at 23-24. In other words, the decisions in this case and *Communications Workers Local 1104* **do** conflict!

Both Respondents contend that *Communications Workers Local 1104* and *Pipefitters Local 120* are distinguishable, because the employees' membership here was not wholly denied or ended, merely significantly impaired. NLRB's Opp'n at 16; Boilermakers' Opp'n at 26. The cases cannot be distinguished on this basis. When "membership is denied or terminated" for reasons other than nonpayment of dues, 29 U.S.C. § 158(a)(3), 2d proviso, pt. (B) (1988), and dues are still collected, the invidious practice is not denial of the title "member." It is deprivation of the rights to "attend union meetings, vote . . . , or participate in other internal union affairs." *See Pipefitters Local 120*, 719 F.2d at 184 (citing *Communications Workers Local 1104*). In short, the pernicious practice in the denial of membership is the substantial impairment of membership rights that occurred here.

The Boilermakers also argue that this case is distinguishable from *Communications Workers Local 1104*, because section 7 did not protect the employees' conduct here. Boilermakers' Opp'n at 24 n.14. As we show in the Petition at 19-21 and *infra* pages 9-10, that is wrong.

V. The Board's *Post Hoc* Argument that Section 7 Does Not Protect Employees' Efforts to Take Positions Out of a Bargaining Unit Is Unreasonable

The Boilermakers claim that the Board "recognized that Petitioner's conduct . . . was not protected under § 7." They argue that this decision "must be accorded deference and upheld if reasonable." Boilermakers' Opp'n at 27. However, in fact, the Board itself did not decide whether section 7 protects the conduct for which the union imposed discipline here. *See* Pet. App. B at 24a-26a. The Administrative Law Judge did rule that section 7 did not protect the employees' conduct, but without explanation. He simply assumed, *ipse dixit* and illogically, that, because the discipline did not violate the Act, the conduct was unprotected. *See id.* at 50a-53a. A holding that the Board's decision neither stated nor gave reasons for is due no deference.

Moreover, it is unreasonable to argue, as the Board now apparently does, and the Boilermakers explicitly do, that dissident intra-union activity is unprotected if it "violat[es] a legitimate union rule" that may lawfully be enforced with discipline. NLRB's Opp'n at 16; *see* Boilermakers' Opp'n at 27-28. A union may lawfully discipline its members for violating a rule against "strikebreaking," because "strikebreaking" undermines its effectiveness as a bargaining agent. *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 181-82 (1967). However, "strikebreaking" nonetheless is conduct protected by section 7. *Pattern Makers*, 473 U.S. at 101. Consequently, both the Second Circuit and the Board, at least before this case, held that a union violates section 8(b)(1)(A) if it insists on compliance with a compulsory unionism agreement by an employee whose membership it has denied or substantially impaired for "strikebreaking." *Communications Workers Local 1104*, 520 F.2d at 414, 418-19; *Machinists District 94*, 283 N.L.R.B. at 892-93.

Similarly, a union may lawfully discipline its members for violating a rule against not supporting it in organizing drives, because both defensive and offensive organizing "assist the union in solidifying" its status as collective-bargaining representative. *See Meatcutters Local 593*, 237 N.L.R.B. 1159, 1160-61 (1978).

Yet, section 7 still protects organizing for a rival union, and a union violates section 8(b)(1)(A), if it demands compliance with a "union security" agreement by an employee whom it has lawfully denied membership for such organizing. *Communications Workers Local 1104*, 520 F.2d at 414-15, 418-19.

There is simply no rational basis for distinguishing the dissident intra-union activity here from "strikebreaking," organizing for a rival, or the other dissident activities held to be protected by section 7 in the cases cited in the Petition at 19-21. Indeed, in another case not cited there, *Newspaper Guild Local 26*, 265 N.L.R.B. 382 (1982), the dissident activity held to be protected by section 7 was **the same** as that in this case: support of taking certain positions out of a bargaining unit.[7] *Compare id.* at 382-83 *with* Pet. App. A at 5a-6a. This also is not a "fact-bound" question, "limited to this case alone," as the Boilermakers' Opposition at 30 asserts. The issue presented is whether, **as a general principle**, employees' efforts to remove positions from their unit are protected by section 7.

CONCLUSION

The petition should be granted as to all questions.

Respectfully submitted,

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[7] The Boilermakers disingenuously suggest that Gilbert "could have resigned his membership and avoided any internal discipline whatsoever." Boilermakers' Opp'n at 28. If Gilbert had resigned, he could not have tried to get the members of his local to agree to take positions out of their unit, because nonmembers cannot make, debate, and vote on proposals at union meetings.